THE ADDITIONAL CASE OF ELISABETH,

Claiming the TITLE and DIGNITY of

Counteſs of SUTHERLAND,

By her GUARDIANS.

Wherein the Facts and Arguments in ſupport of her Claim are more fully ſtated, and the Errors in the Additional Caſes exhibited for the other Claimants are detected.

To be heard at the Bar of the Houſe of Lords, upon the day of 177

ERRATA.

Pag. 7. *l.* 2. *for* 1615. *read* 1662.

Chap. I. *p.* 10. *l.* 1. *for* tha *r.* that

Chap. V. *p.* 20. *l.* 16. *for* 1263; *r.* 1293;

Chap. VI. *p.* 148. *l.* 5. *from the bottom, for* fui *r.* fuis

Chap. VI. *p.* 152. *note* (*o*) *l.* 5. *from the bottom, for* honours, refignation *r.* refignation of honours,

Chap. VI. *p.* 153. *l.* 15. *for* ino *r.* into

THE
ADDITIONAL CASE
OF
ELISABETH,
Claiming the TITLE and DIGNITY of
Counteſs of SUTHERLAND,

By her Guardians, his Grace *John* Duke of *Athol*, *Charles* Earl of *Elgin* and *Kincardin*, the Hon. *James Wemyſs* of *Wemyſs*, Sir *David Dalrymple*, of *Hailes*, Baronet, Sir *Adam Ferguſſon*, of *Kilkerran*, Baronet, *Alexander Boſwel*, of *Auchinleck*, Eſq; and *John Mackenzie* of *Delvin*, Eſq;

Wherein the Facts and Arguments in ſupport of her Claim are more fully ſtated, and the Errors in the Additional Caſes exhibited for the other Claimants are detected.

WILLIAM late Earl of Sutherland died 16th June 1766, leaving the claimant his only child, now an infant five years old. The guardians of the claimant were adviſed, that her right to the title of honour and dignity of the family was equally indiſputable as her right to the eſtate; both having been enjoyed by her anceſtors in right of a female ſucceſſion.

 Nevertheleſs

Sir Robert Gordon's petition, claiming the dignity of Earl of Sutherland.

Nevertheless Sir Robert Gordon of Gordonstoun, Baronet, presented a petition to his Majesty, setting forth, "That in 1517, "or thereabouts, Adam Gordon of Aboyne having married Elisa- "beth Sutherland, only sister to the late Earl of Sutherland, of the "name of Sutherland, and who had succeeded to the family-estate "on the death of her brother, WAS CREATED Earl of Sutherland, "and Lord Strathnaver.

"That no record, or other evidence in writing, of the manner "and limitation of the creation, have hitherto been discovered; but "the titles and dignity of Earl of Sutherland, and Lord Strathnaver, "with all the privileges following such degree of peerage, have been "constantly enjoyed and exercised by the said Adam, and his de- "scendents in the male line, from the time of his creation down- "wards.

"That Adam Earl of Sutherland had by his wife, the said Elisa- "beth, a son, Alexander, who died before his father.

"That Earl Adam was succeeded by his grandson (Alexander's "son) John Earl of Sutherland; who was succeeded by his son and "heir Alexander Earl of Sutherland; who, besides John, his eldest "son and successor, had another son, Sir Robert Gordon of Gor- "donstoun, Baronet, the petitioner's great-grandfather.

"That by the death of *William*, the late Earl of Sutherland, with- "out issue-male, the whole male line of the second John Earl of "Sutherland is extinct, and at an end; and the said titles, honours, "and dignity, have devolved on the petitioner; and therefore "praying, that the petitioner's right and title to the said honours "and dignity may be declared and established."

The claimant's petition.

A petition was thereafter presented on behalf of the claimant, setting forth, "That the earldom of Sutherland is one of the most "ancient dignities in Scotland; and it appears, from the charters "and title-deeds of the family, that the grants of the lands and "earldom were uniformly in favour of *heirs*, until limited to heirs- "male in 1601; but the destination to *heirs* was restored by a sub- "sequent charter in 1681, and has not been varied since that pe- "riod.

"That

" That in 1514, John, then Earl of Sutherland, having died " without iſſue, his ſiſter *Eliſabeth* took the dignity and earldom, as " *heir* to her brother, without challenge from any collateral heir-" male; and Adam Gordon, brother to the Earl of Huntly, her " huſband, aſſumed the title by courteſy, in her right, agreeable to " the ancient cuſtom which prevailed in Scotland.

" That, in 1527, Eliſabeth Counteſs of Sutherland, with conſent " of her huſband, reſigned the earldom and eſtate in favour of her " ſon Alexander, and *his heirs*; reſerving the liferent to her huſband " *Adam Gordon, by reaſon of the courteſy of Scotland.*

" From that period, this dignity and eſtate have been enjoyed, in " a regular deſcent from father to ſon, until the year 1766, when " William the laſt Earl of Sutherland died, leaving this infant peti-" tioner, his only child, who apprehends that ſhe is clearly intitled " to the dignity by lineal deſcent."

Afterwards a third petition was preſented to his Majeſty, by George Sutherland of Forſe, ſetting forth, " That William Earl of " Sutherland died towards the end of the 13th [14th] century, lea-" ving a ſon, Robert, the heir of his titles and eſtate, (who had iſ-" ſue-male), and a younger ſon, Kenneth, (who alſo had iſſue-male); " and your petitioner is the lineal male deſcendent of the ſaid Ken-" neth.

Petition for George Sutherland of Forſe, claiming the dignity.

" That from the ſaid Robert Earl of Sutherland the peerage of " this family deſcended, and was enjoyed, in a direct male line, from " father to ſon, till it came to John Earl of Sutherland, who died " without iſſue, in the year 1514; when the family-eſtate was claim-" ed and taken by his ſiſter Eliſabeth; who intermarried with Adam " Gordon, a younger ſon of Gordon Earl of Huntly.

" That the ſaid Eliſabeth, ſome time after the deceaſe of her bro-" ther, the ſaid John Earl of Sutherland, aſſumed the title of *Count-" eſs of Sutherland*; and the ſaid Adam Gordon, her huſband, took " the title of *Earl of Sutherland*, and *Lord* or *Baron of Strathnaver*; " by or under whatever right or authority, is to the petitioner as yet " unknown; but he conjectures the ſaid Eliſabeth aſſumed the titles " and honours of the family, in prejudice of the heirs-male, upon

" the

" the ground, that ſhe, though a female, being poſſeſſed of the e-
" ſtate, was intitled to the honours alſo; and the ſaid Adam Gordon,
" her huſband, in right of his ſaid wife, aſſumed the ſaid honours
" and dignities, in virtue of the courteſy of Scotland: and the ſaid
" Eliſabeth and her ſaid huſband being ſucceeded by Alexander Gor-
" don, their eldeſt ſon and heir, the ſucceſſion, both in the honours
" and eſtate, was carried on downwards, from the ſaid Alexander, by
" males in this Gordon race, from father to ſon, till it came to the
" late William Earl of Sutherland, who died in the year 1766, lea-
" ving iſſue only one daughter, Eliſabeth.

" That at the time of the death of the above-named John Earl
" of Sutherland in 1514, the neareſt heir-male then exiſting, of the
" ancient race of Earls of Sutherland, was by law intitled to claim
" the peerage, in oppoſition to the above-named Eliſabeth, the heir-
" female; but the male deſcendents of the above-named Kenneth, the
" younger ſon of William Earl of Sutherland firſt above named, not
" being, at the time of the deceaſe of the ſaid John Earl of Suther-
" land in 1514, the neareſt branch of heirs-male exiſting, and intit-
" led, did not, and could not, claim. But now, after the extinc-
" tion of all the nearer male deſcendents of the ſaid ancient race of
" Earls of Sutherland, the petitioner, the neareſt lawful male de-
" ſcendent of the above-named Kenneth, the younger ſon of Wil-
" liam Earl of Sutherland firſt above named, being the true and
" ſole heir-male of the ſaid ancient race of Earls, and being advi-
" ſed, and humbly conceiving, that the right of ſucceeding to the
" titles, honours, and dignities, of Earl of Sutherland, and Lord
" or Baron of Strathnaver, and ſuch other honours and dignities as
" belong to the family, are in law and juſtice caſt upon the peti-
" tioner, as being the true and ſole heir-male of the ſaid ancient
" race of Earls of Sutherland: and therefore praying, that the pe-
" titioner's right and title to the ſaid honours and dignity may be
" declared and eſtabliſhed."

Dec. 3. 20. 1767. and Jan 25. 1768. His Majeſty was graciouſly pleaſed to refer the ſeveral petitions of the claimants to the conſideration of the Houſe of Lords.

Caſes

Caſes for the ſeveral claimants were prepared, and diſtributed. In them the chief arguments and authorities were conciſely ſet forth.

While the cauſe was in this ſtate, Sir Robert Gordon, one of the claimants, exhibited a *Supplemental Caſe.*

It conſiſted of forty folio pages, cloſely printed, on a ſmall type; it appealed to records innumerable; it contained much *new* matter.

According to its title, it was a caſe, " *in which all facts and ar-* " *guments in ſupport of Sir* Robert's *claim are ſtated, and the inaccura-* " *cies in his original caſe and appendix, which were printed before the* " *proofs arrived from* Scotland, *are corrected* (*a*)."

A caſe voluminous, and apparently learned, drawn up with the expreſs purpoſe of correcting all former inaccuracies, was formidable at ſo late an hour.

Had the cauſe immediately gone on to a hearing, every new authority and new argument urged for Sir Robert Gordon muſt have been admitted as unexceptionable.—There was no time left, for tracing his authorities, or unravelling his arguments.

The candour and impartiality of the Houſe of Lords, would not ſuffer parties to debate upon ground ſo unequal.

Maintaining the high character of the moſt reſpectable judicature in Europe, they indulged the guardians of the infant claimant with an opportunity of examining Sir Robert Gordon's authorities and arguments.

At the expence of much time and labour thoſe authorities and arguments have *now* been examined (*b*). The reſult of the examination will be ſeen in the following ſheets.

The ſame candour and impartiality which permitted this Supple-

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*a*) A Supplemental Caſe was alſo exhibited for Mr Sutherland of Forſe.

(*b*) At the expence of *how* much time, and *how* much labour, *they* alone can tell who have been engaged in making the neceſſary reſearches, and in arranging the materials. It has been the work of days to inveſtigate ſome *hazarded error*; many pages have been often required to correct the miſtake of a line.

mental Caſe, will not, *before peruſal*, pronounce it immoderately long and diffuſe.

After peruſal, every equitable reader will determine whether leſs could have been ſaid, without neglecting or injuring the cauſe of an orphan.

The guardians of Lady Eliſabeth will be permitted to make one preliminary obſervation. They conſider it as ſtill of more moment to ſecure their own good name, than to ſecure a title of honour to their ward; and therefore they muſt expreſs their aſtoniſhment at the inſinuation repeatedly uſed and enforced, that material writings, and eſpecially the ſuppoſed *inſtrument of creation* of Adam Gordon, had been induſtriouſly deſtroyed or ſuppreſſed.

In what part of the tenor of their lives Sir Robert Gordon has found out a preſumption that they would deſtroy or ſuppreſs evidence, they are yet to learn.

They know that the inſinuation is weak, ill-judged, and injurious; *weak*, becauſe no attempt is made, or can be made, to prove it; *ill-judged*, becauſe it may imply an acknowledgement, that the materials on which Sir Robert Gordon has wrought, are ſcanty and inſufficient; and *highly injurious*, becauſe the rank and character of Lady Eliſabeth's guardians place them much above thoſe little ſuſpicions, and yet ſuch ſuſpicions are openly expreſſed or ſarcaſtically hinted at in numberleſs paſſages of the Supplemental Caſe.

In particular, it is inſinuated, that the *inſtrument of creation* of Adam Gordon has been ſuppreſſed; and yet it is certain, and the guardians of Lady Eliſabeth will hereafter prove it, that there is neither evidence nor probability that ſuch inſtrument ever exiſted at all.

Does Sir Robert Gordon, or his counſel, or any one conductor of his cauſe, really imagine, that the guardians of Lady Eliſabeth would aſſert her claim to the honours of Sutherland, if they knew, or believed, or ſuſpected, that an inſtrument of creation limiting thoſe honours to *heirs-male*, exiſted, or did ever exiſt?

Sir Robert Gordon, the claimant's anceſtor, wrote a voluminous hiſtory

hiſtory of the family of Sutherland. He was for many years the guardian of his nephew John Earl of Sutherland, who died in ~~1615~~ 1662.

Moſt fortunately this hiſtory contains a complete and accurate inventory of the whole writings of the family, which were at that time in the cuſtody of Sir Robert Gordon. To ſuch of them as are extant, his great-grandſon has always had acceſs. He is now called upon to ſay what writing has been ſuppreſſed, or detained from his inſpection. At the ſame time, he will be pleaſed to point out any paſſage of the hiſtory of the family of Sutherland where there is any inſinuation of a new creation, or of a patent of honour.

For their own juſtification the guardians have reſolved to do what the law requires not.

They have intimated to the manager for Sir Robert Gordon, that they will afford him a full and free inſpection of every ancient inſtrument of the family of Sutherland which is in their poſſeſſion.

If they know of any other inſtrument, not in their poſſeſſion, they will point it out.

It cannot be expected that the guardians themſelves ſhould be in a condition to make oath upon the premiſſes, or, according to the phraſe of the law of Scotland, *depone as in an exhibition.*

But they will do what in the law and practice of Scotland is always held equivalent. They will produce the man of buſineſs whom they have employed to ſearch into the archives of the family of Sutherland; and Sir Robert Gordon, if he ſhall be ſo adviſed, may demand his oath.

The guardians are aware, that they here grant an indulgence which the law requires not, and which the ſtrain of Sir Robert Gordon's Supplemental Caſe ought not to have obtained.

But they make this unuſual conceſſion for their own honour in the eſtimation of poſterity, when characters may be forgotten, or miſunderſtood.

The propoſition which Sir Robert Gordon is obliged to maintain by his petition is, "That Adam Gordon of Aboyne was created Earl "of Sutherland, and Lord Strathnaver, with a limitation to the "heirs-

The general propoſitions maintained by the ſeveral claimants.

" heirs-male of his body;" for if there was no ſuch creation and limitation, he can have no right to this honour.

The infant daughter of the late Earl of Sutherland maintains, That the dignity of the earldom of Sutherland deſcended to Lady Eliſabeth, as ſiſter, and heireſs, of John Earl of Sutherland, in 1514; who, in *her own right*, was Counteſs of Sutherland, and to whom the claimant is heir-general.

The other petitioner, George Sutherland of Forſe, maintains, That this honour did not deſcend to Lady Eliſabeth; but, upon the death of John Earl of Sutherland in 1514, belonged of right to the next heir-male; and that he is now the neareſt heir-male of the ſaid John; although no claim has ever been made, by any perſon in that right, for upwards of 250 years.

If the claimant Lady Eliſabeth ſhall prevail in eſtabliſhing the propoſition ſhe maintains, it is a neceſſary conſequence, that neither of the other claimants have any right: but although ſhe ſhould fail in eſtabliſhing this propoſition, it will not follow, that the title muſt belong to one of the other claimants; for each of them is bound to make out the affirmative propoſition which he has undertaken to prove.

If any patent of the honour could be produced, the controverſy would be very ſhort; but it muſt be admitted on all ſides, that no patent does exiſt. The deſcent, then, of the honour muſt be proved, from ſuch writings and deeds of the family as have eſcaped the injuries of time, from ſimilar or analogous inſtances, and from the general principles of law with regard to the ſucceſſion of dignities.

It is neceſſary, in the firſt place, to trace the hiſtory of the family of Sutherland, in order to ſhew in what courſe of ſucceſſion the eſtates of that family have been held.

The firſt of the family of Sutherland, diſcoverable upon record, is a perſon termed, according to the ſimplicity of ancient times, *Hugo Freſkyn.*

Between 1186 and 1214 he granted, " Magiſtro Gilberto Archidiacono Moraviæ, *et illis hæredibus de parentela ſua quibus ipſe dare et concedere voluit, et hæredibus eorum,* totam terram meam de

" Scelbol

" Scelbol in Sutherlandia, &c. tenend. et habend. *ſibi, et hæredibus* " *ſuis prænominatis, in perpetuum, de me, et hæredibus noſtris, &c.* (*c*)."

This grant was confirmed before 1214, by " *Willielmus Dominus* " *de Sutherlandia*, filius et hæres quondam Hugonis Freſkyn (*d*)."

Both grants were confirmed by William King of Scots between 1211 and 1214 (*e*).

In the year 1275, an indenture was made between Archibald Biſhop of Caithneſs, and William Earl of Sutherland, by which it appears, that there had been controverſies, " *inter* Gilbertum, *Wil-* " *lielmum, et Walterum, bonæ memoriæ, Epiſcopos Cathaniæ, et nobiles vi-* " *ros, Willielmum, claræ memoriæ, et Willielmum ejus filium, Comites Su-* " *therlandiæ* (*f*)."

This Gilbert, formerly Archdeacon of Murray, became Biſhop of Caithneſs in 1222, and died in 1245 (*g*).

The indenture therefore proves, that there exiſted a *William Earl of Sutherland*, between 1222, and 1245.

In all probability he was the ſame perſon with *Willielmus Dominus de Sutherland*, the ſon and heir of Hugh Freſkyn, who confirmed the grant to Archdeacon Gilbert, before the year 1214.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*c*) *Original grant*, produced by the claimant.

This grant muſt have been made before 1214; for it is confirmed by William King of Scots, who died in 1214. Yet it cannot, in all probability, be prior to 1186. Perhaps it is long poſterior. Gilbert, Archdeacon of Moray, afterwards Biſhop of Caithneſs, died in 1245; *Keith*, Catalogue of Scottiſh Biſhops, p. 124. Suppoſing him to have become Archdeacon of Moray ſo early as at the age of twenty-one, and to have lived to the age of fourſcore, the grant by Hugo Freſkyn could not have been made before 1186.

It may be remarked in paſſing, that, according to Sir Robert Gordon's hypotheſis, the grant by Hugo Freſkyn is of this import, to the *heirs-male of proviſion* of Mr Gilbert, Archdeacon of Moray, being of his kindred, and to their *heirs-male for ever*, to be held of the *heirs-male* of the granter.

(*d*) *Confirmation*, produced by the claimant.

(*e*) *Confirmation*, produced by the claimant. The date is fixed by the mention of *W. de Boſco Cancel*; as a witneſs. He did not become chancellor till 1211. *Crawfurd*, Officers of State, p. 11.

(*f*) *Indenture* 10. calend. Octobris 1275, in the claimant's poſſeſſion, and printed in the Appendix of her original Caſe, N° 1.

(*g*) *Keith*, Catalogue of Scottiſh Biſhops, p. 124.

The indenture alſo proves, that he was dead in 1275 (*h*), and that William Earl of Sutherland, then living, was his ſon; *claræ memoriæ, ejus filium.*

William Earl of Sutherland, who entered into the foreſaid agreement with the Biſhop of Caithneſs, was ſucceeded by Kenneth his ſon, killed at the battle of Halidon-hill, in the year 1333 (*i*).

Kenneth was ſucceeded by his ſon William. He married Margaret the ſiſter of David II. King of Scots; who, by a royal grant in the year 1347, erected the earldom of Sutherland into a regality in favour of this Earl William, and Margaret his wife (*k*).

The charter grants, " Quod ipſi, *et hæredes inter ipſos legitimè procreandi*, habeant, teneant, et poſſideant, de nobis, et hæredibus " noſtris, totum comitatum Sutherlandiæ, in adeo liberam regalita- " tem in perpetuum, cum omnibus et ſingulis libertatibus, com- " moditatibus, aſiamentis, juſtis pertinentiis, et liberis conſuetu- " dinibus, quæ ad liberam regalitatem ſpectare noſcuntur, in om- " nibus, et per omnia, ſicut aliqua regalitas per totum regnum no- " ſtrum poſſidetur ab aliquo, ſeu tenetur."

Hiſtorians and genealogiſts have erred as to the names of the children of this Earl William. The claimant implicitly adopted their hypotheſis. Sir Robert Gordon, and Mr Sutherland of Forſe, diſcovered that error, and ſubſtituted other errors in its room.

An inſtrument preſerved in the tower of London, hitherto overlooked by all parties, will ſerve to correct the error of the claimant, and of her competitors.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*h*) Indeed he muſt have been dead long before; for Biſhop Walter, with whom his ſon had the controverſy, died in 1270. See *Keith*, p. 125. Sir Robert Gordon, and A. Roſſeus, the hiſtorians of the family of Sutherland, ſay, that he died in 1248, while his ſon was yet a child.

(*i*) *Obligation* in favour of the Damſel of Norway, 5th February 1283-4, by William Earl of Sutherland, &c. *Rymer*, t. 2. p. 266. *Letter* from the nobility of Scotland to the Pope 1320, ſigned by William Earl of Sutherland. *Fordun*, vol. 2. p. 275. The family-hiſtorians repreſent him as very aged about that time. *Renunciation* by Kenneth Earl of Sutherland, ſon of the deceaſed William Earl of Sutherland, in favour of Reginald de Moravia, in 1330.

(*k*) *Charter*, 10th October, 10th David II. produced.

William

William Earl of Sutherland, the brother-in-law of David II. had two ſons, John and William; John died in England, while an hoſtage for payment of the ranſom of David II. (*l*).

There is no reaſon for doubting that this William ſucceeded his father, and was the Earl of Sutherland ſo often mentioned by Froiſſart, as at the ſurpriſe of Berwick in the year 1384, and at the invaſion of England in the year 1388 (*m*).

This

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*l*) Our hiſtorians concur in aſſerting, that the Earl of Sutherland's ſon, the hoſtage, was named *Alexander*. See *Boece*, l. 15. p. 326 b. and *Buchanan*, l. 9. p. 167. The hiſtorians of the family of Sutherland ſay, that Margaret, the ſiſter of David II. bore two ſons to the Earl of Sutherland, Alexander and John; and they agree, that the name of the hoſtage was *Alexander*. It is certain, however, that his name was *John*. See *Rymer*, t. 5. p. 724. where he is termed *Johannes filius et hæres Willielmi Comitis Sutherlandiæ*.

John the hoſtage died in England 1361. Fordun, or more properly his Continuator, Bower, thus ſpeaks: "Eodem etiam anno [1361], præmiſsâ mortalitate nimium præva-"lente, mortui ſunt quidam de melioribus et natu Scotiæ nobilioribus, obſides pro Rege "ſuo David, viz. Johannes de Sutherland, *unicus* filius Comitis ejuſdem, nepos Regis, a-"pud Linconiam, circa feſtum Nativitatis noſtræ Dominæ."

The hiſtorian was undoubtedly miſtaken in ſaying, that John was the *only* ſon of the Earl of Sutherland; for there is extant, in the tower of London, a protection to *Willielmus de Murref, filius Comitis Sutherlandiæ*, 28th January 1367, of the tenor following. "Rotulus Scotiæ de anno regni Regis Edwardi Tertii quadrageſimo primo. D. Conductu. "Edwardus, Dei gra. Rex Angl. Dus Hibn. & Aquit. omnibz. ballivis et fidelibz. ſuis, "ad quos pſentes Lre pvenint, ſaltm. Sciatis qd ſuſcepimus in pteccoem et defenſionem nram, "necnon in ſalvu. et ſecuru. conductu. nrm Willm de Murrif, fil. Willi Comitis Suther-"land de Scot. qui in Angl. morat. ac res et bona ſua quecumq; : Et ideo vob. man-"damus, qd eidem Willo, in pſona, bonis, aut rebz. ſuis pdeis non inferatis, ſeu quan-"tum in vob. eſt, ab aliis inferri pmittatis injuriam, moleſtiam, dampnu. violenciam, im-"pedimentum, ſeu gravamen; et ſi quid eis foris fcm. fuerit, id eis ſine dilone debite cor-"rigi et reformari fac. In cujus rei teſtimoniu. has lras nras fieri fecimus patentes p. "unu. annu. duratur. T. me ipo apud Weſtm. xxviii. die Januar. anno R. nr. quadra-"geſimo primo. P. Conſ." —— *Certified copy*, from the Records in the Tower.

Now if John, who died in 1361, was at that time the *only* ſon of William Earl of Sutherland, it follows, that Edward III. granted a protection to William, when a child of *ſix years old at moſt*, for himſelf, his goods, and chattles; which is utterly abſurd.

This inſtrument is curious on another account; as it confirms the tradition, that the family of Sutherland were, from their original country, ſtyled *de Moravia*.

No one need wonder, that the pedigree of the family of Sutherland ſhould have been thus uniformly miſapprehended by all who treated of it. There is an example of the ſame kind, ſtill more extraordinary, becauſe it occurs in the pedigree of the houſe of Douglas. No one doubts that Archibald, ſurnamed *the Grim*, 3d Earl of Douglas, who died in 1400, was the younger ſon of William, 1ſt Earl; and the younger brother of James, 2d Earl of Douglas, ſlain at Otterburn in 1388; and yet this cannot be true. See *Fordun*, l. 14. c. 16. and eſpecially *Froiſſart*, vol. 3. c. 129. p. 342. Edit. Lions 1560.

(*m*) *Froiſſart*, vol. 2. c. 7. p. 12. c. 9. p. 16. vol. 3. c. 124. p. 330. c. 127. p. 338. Edit.

This William had iſſue two ſons, viz. Robert, who ſucceeded his father in the eſtate and honours (*n*); and,

Kenneth; who, in the year 1400, obtained from his brother a grant of the lands of Drummoy, Backies, and others, to himſelf, and the *heirs-male* of his body, with a clauſe of return in favour of the Earl and his *heirs*, upon the failure of the iſſue-male of the grantee (*o*).

The male deſcendents of this Kenneth, the brother of Robert Earl of Sutherland, exiſted for ſeveral generations, as is ſtated and proved by the writings in the table of pedigree annexed.

John Earl of Sutherland ſucceeded his father Robert; and, in the year 1455, reſigned the earldom in favour of John, his ſon and heir-apparent; who thereupon obtained a charter under the great ſeal, proceeding upon the reſignation of his father, and granting the earldom of Sutherland to him: "*Tenendum illi, et* HÆREDIBUS SUIS: "*Reſervato tamen libero tenemento totius dicti comitatûs, cum pertinen.* "*prædicto Johanni, patri, pro tempore vitæ ſuæ* (*p*)."

It has been aſſerted with great confidence, both by Sir Robert Gordon and Mr Sutherland, that Earl John, who reſigned the earldom in 1455, had an elder ſon, Alexander, who died before his father; and that Alexander had a daughter, Marjory, married to the Earl of Caithneſs.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

Edit. Lions 1560. Mr Sutherland of Forſe, not knowing any thing of William, the ſon of Earl William, has ſuppoſed, that William, the brother-in-law of David II. lived till near the end of the fourteenth century. But it is plain, that the perſon who was active in the border-wars 1384 and 1388, could not have been William, the brother-in-law of David II.; for he, if alive at that time, muſt have laboured under the decrepitude of extreme old age.

(*n*) *Charter*, 16th June 1408, by Mariot Cheyne, "*Kenetho de Sutherlandia*, filio quon- "dam *Willielmi* Comitis Sutherlandiæ," and *Charter*, 8th Auguſt 1418, by Andreas de Keith, to the ſame. Both in the poſſeſſion of Mr Sutherland, one of the claimants.

(*o*) *Charter*, 22d January 1400-1, by Robert Earl of Sutherland, to Kenneth, his brother.

(*p*) Inſtrument of Reſignation, 22d February 1455-6, John Earl of Sutherland, in favour of John Sutherland, his ſon and apparent heir. *Royal Charter*, 24th February 1455-6, upon the foreſaid reſignation by James II. Appendix, N° 4.

Of

Of the exiſtence of this Alexander there is no proof; and it will be demonſtrated hereafter, that Marjory Counteſs of Caithneſs had no connection with the family of Sutherland.

John, who obtained the charter 1455, became Earl of Sutherland upon the death of his father in 1460. He died in 1508, ſeiſed of the eſtate under the charter 1455.

He left iſſue one ſon, John, and one daughter, Eliſabeth, married to Adam Gordon of Aboyne, ſecond ſon of George Earl of Huntly.

Sir Robert Gordon *now* avers, that John, who died in 1508, had another ſon, Alexander. This novel hypotheſis will be conſidered hereafter.

In 1512, John made up his titles to the earldom, by retour, precept, and ſeiſin, as heir of the former inveſtitures (*q*).

In this retour he is named *John Sutherland*; and is found to be *legitimus et propinquior hæres Joannis Comitis de Sutherland.* In the ſeiſin he is named *Joannes Sutherland, filius et hæres Johannis Comitis de Sutherland.*

In 1514, this John dying without iſſue, the ſucceſſion devolved on Eliſabeth, his only ſiſter, the heir of William, the 4th Earl, by the charter 1347, and of John, the 8th Earl, by the charter 1455.

In 1514, Eliſabeth was ſerved and retoured heir in the earldom of Sutherland to her brother John (*r*).

In 1515, by virtue of a precept iſſued from the chancery, Eliſabeth was infeoffed in the earldom (*s*.)

In the retour, in the precept from the chancery, and in the ſeiſin thereupon, ſhe is named " Eliſabeth *Sutherland, ſiſter of the deceaſed*

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*q*) Inſtrument of Seiſin, 14th December 1512, proceeding upon a precept from the chancery for infefting John Sutherland, as neareſt lawful heir of John Earl of Sutherland his father.

(*r*) Special Retour, dated 3d October 1514.

(*s*) Precept, dated 24th October 1514.
Inſtrument of ſeiſin, dated 30th June 1515, in favour of a Noble Lady, *Lady Eliſabeth Sutherland, wife of Adam Gordon of Aboyn*, as heir of umquhile John Earl of Sutherland, her brother.

" *John Sutherland, Earl of Sutherland,*" in the ſame manner as her brother Earl John was named " John Sutherland" ſimply, before his titles were completed. Neither Eliſabeth, nor her brother John, (though at the time of his ſervice his father had been dead four years), are deſcribed by any name of dignity (*t*).

After Eliſabeth had completed her right to the earldom of Sutherland, ſhe conſtantly bore the title of *Counteſs of Sutherland* (*u*).

Her huſband Adam Gordon, according to the cuſtom of that age, ſtyled himſelf *Earl of Sutherland*, as tenant, by the courteſy, of the honour. Under that appellation he is mentioned in various deeds.

In a charter, dated 26th March 1525, granted by him and the Counteſs, though he is deſigned *Adam Gordon Comes de Sutherland*, yet the charter is ſubſcribed thus: " *Adam Gordon, with my hand at* " *the pen, led by Mr Thomas Gadarar notar-public. Elizabeth Suther-* " *land, Counteſs of Sutherland, with my hand at the pen, led by the fore-* " *ſaid Mr Thomas notar* (*v*)."

In 1527, this Eliſabeth, by the ſtyle and title of *Elizabeth Counteſs and Heretrix of Sutherland, with conſent of Adam Earl of Sutherland* her ſpouſe, entered into a contract with Alexander, their ſon and apparent heir; purporting, That the ſaid Eliſabeth, with conſent of Adam her ſpouſe, ſhall make procuratory to reſign the earldom of Sutherland in the hands of the King, " in favour of the ſaid *Alexander* and " *his heirs*; reſerving the frank tenement (or freehold) of the ſame " to the ſaid Eliſabeth, and Adam, and the longeſt liver of them, " for all the days of their lives (*w*)."

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*t*) Her grandſon John, and her great-grandſon Alexander, were alſo ſerved by their name and ſurname, without their title.

This evidently ſhews, that the title, as well as the eſtate, was not underſtood in thoſe days to be veſted in the heir without the formality of a ſervice; for the maxim, *Quod mortuus ſaſit vivum*, did not obtain in the law of Scotland, either with regard to corporeal or incorporeal inheritances.

(*u*) *Chartee*, dated 5th September 1516, by Eliſabeth, deſigned *Comitiſſa de Sutherland, et hæreditaria Domina comitatûs ejuſdem*, cum conſenſu et aſſenſu Nobilis Domini, Domini Adami Gordon, ſui ſponſi, Comitis de Sutherland, in favour of John Earl of Caithneſs.

Precept upon the ſaid charter, wherein the deſignation of the granter is the ſame as in the charter.

(*v*) *Charter*, dated 25th March 1525, in favour of *William Sutherland of Duffus*.

(*w*) *Contract*, dated 9th November 1527.

Immediately

Immediately upon this, a procuratory was made by "*Eliſabeth Sutherland, Counteſs of Sutherland, and heritable Lady of the ſame*, with "conſent of a Noble Lord Adam Gordon, Earl of the ſaid earldom "of Sutherland, her ſpouſe, for reſigning the earldom of Sutherland in the King's hands, in favour of Alexander Gordon, Maſter "of Sutherland, her eldeſt ſon; reſerving to herſelf, and the ſaid "Lord Adam her ſpouſe, and the longeſt liver of them, the frank "tenement of the ſaid earldom, &c. (*x*)."

Upon this reſignation, James V. King of Scotland, granted a charter to Alexander Gordon, ſon and heir-apparent of Adam Earl of Sutherland, and Eliſabeth Sutherland, Counteſs of Sutherland, his ſpouſe, of the earldom of Sutherland, &c. "TENEND. ET HA-"BEND. *totum et integrum prædictum comitatum de Sutherland, &c.* "*cum pertinen.* dicto Alexandro Gordon, et hæredibus ſuis, *de nobis*, "&c. *adeo liberè*, &c. *ſicut* dicta Eliſabetha, vel predeceſſores ſui "Comites de Sutherland, *dictum comitatum et terras, cum pertinen. de* "*nobis tenuerunt: reſervato tamen libero tenemento totius dicti comitatus* "*dictæ* Eliſabethæ Comitiſſæ de Sutherland, et Adæ Gordon, ſponſo "ſuo, RATIONE CURIALITATIS SCOTIÆ, *et eorum alteri diutius* "*viventi, pro toto tempore vitæ ſuæ* (*y*)."

In the preciſe form of this charter, Alexander was infeoffed 20th December 1527 (*z*).

Alexander died in 1529 before his father. He was ſucceeded by his ſon John, the 10th Earl of Sutherland.

The Counteſs died in September 1535, and Adam Gordon in March 1538 (*a*).

John was ſerved neareſt and lawful heir to his father Alexander,

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*x*) Procuratory by Eliſabeth Sutherland, Counteſs of Sutherland, and heritably Lady of the ſame, with conſent of a Noble Lord, Adam Gordon, Earl of Sutherland, her ſpouſe, dated 10th November 1527.

(*y*) Royal Charter, dated 1ſt December 1527, Appendix, N° 5.

(*z*) Inſtrument of ſeiſin thereupon, dated 20th December 1527.

(*a*) Sir Robert Gordon's MS. Hiſtory, p. 64. Service of John Gordon in the lands of Aboyne, as heir to Adam, 1ſt October 1538.

4th

4th of May 1546 (*b*), and took infeoffment upon a precept iſſued from the chancery 7th June 1546 (*c*.)

By a royal charter, 6th of Auguſt 1546, proceeding upon the ſaid John Earl of Sutherland's own reſignation, the earldom was granted to the ſaid John Earl of Sutherland, and Lady Eliſabeth Campbell, Counteſs of Moray, his ſpouſe, and longeſt liver of them, in conjunct fee: "TENEND. ET HABEND. &c. *præfatis* Joanni *Comiti de* "Sutherland, *Dominæ* Eliſabethæ Campbell, *ſuæ ſponſæ, et eorum alteri* "*diutius viventi, in conjuncta infeodatione*, et hæredibus inter illos le- "gitimè procreatis ſeu procreandis; quibus deficient. legitimis et "propinquioribus hæredibus dicti Comitis quibuſcunque, ſeu aſ- "ſignatis (*d*)."

Upon this charter infeoffment was taken 13th October 1546 (*e*).

This John was ſucceeded by Alexander, the 11th Earl of Sutherland; who was infeoffed in the earldom upon a precept from the chancery, proceeding upon the retour of his ſervice (*f*).

In 1580, he reſigned the earldom in the King's hands for new infeoffment to be granted, "in favorem Joannis Magiſtri Sutherlandiæ, "*dicti Comitis filii primogeniti*, hæredum et aſſignatorum dicti Johannis "quorumcunque;" reſerving the father's frank tenement and liferent-right of the whole earldom (*g*).

Upon this reſignation James VI. granted a charter of the whole earldom in favour of the ſaid *John* Maſter of *Sutherland, and his heirs and aſſignees whatſoever*.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*b*) Retour of the ſpecial ſervice of John Earl of Sutherland, as heir to his father, dated 4th May 1546.

(*c*) Inſtrument of ſeiſin, proceeding upon a precept iſſued from the chancery, dated 7th June 1546.

(*d*) Charter by Queen Mary, dated 6th Auguſt 1546, Appendix, N° 6.

(*e*) Inſtrument of Seiſin, dated 13th October 1546.

(*f*) Retour, dated 8th July 1573, and Inſtrument of Seiſin, (containing the Precept for infeoffment), dated 27th July 1573.

(*g*) Royal Charter, dated 23d March 1580, and infeoffment thereon, 11th June 1583. Vide Charter, Appendix, N° 7.

This

This Earl Alexander died in 1594; leaving, beſides his eldeſt ſon John, who ſucceeded him in his honours and eſtate, two ſons, *viz.*

Robert, a ſecond ſon, anceſtor of Sir Robert Gordon of Gordonſton, Baronet, now claiming the dignity of Earl of Sutherland, as heir-male deſcended of Adam Gordon and Eliſabeth Counteſs of Sutherland,

And Alexander, a third ſon.

John, the 12th Earl of Sutherland, having, in 1601, reſigned in the King's hands the earldom, and certain detached parcels of land lately acquired, did obtain from King James VI. a charter of *Novodamus*, annexing theſe lands to the earldom, and granting the whole lands and eſtate of the earldom to the ſaid John Earl of Sutherland, "*ſuiſque hæredibus maſculis* inter ipſum et Dominam *Annam Elphinſton*, "*Sutherlandiæ Comitiſſam*, ejus ſponſam, legitimè procreatis ſeu "procreandis; quibus deficient. ſuis hæredibus maſculis de cor- "pore ſuo legitimè procreandis; quibus deficientibus, *Roberto Gor-* "*don*, ſuo fratri germano, ſuiſque hæredibus maſculis de corpore "ſuo legitimè procreandis; quibus deficientibus, *Alexandro Gordon*, "etiam ſuo fratri germano, ſuiſque hæredibus maſculis de corpore "ſuo legitimè procreandis; quibus omnibus deficientibus, *Adamo* "*Gordon*, filio legitimo Georgii Marchionis de Huntley, ſuiſque hæ- "redibus maſculis quibuſcunque, hæreditariè (*h*).

Upon this charter infeoffment paſſed 3d June 1601 (*i*).

John, the 13th Earl of Sutherland, was, in 1616, duly ſerved heir to his father, the laſt Earl, in the earldom and whole lands thereof (*k*).

In 1662, the ſaid John Earl of Sutherland, having reſigned the earldom in the hands of the King, a charter was obtained from King Charles II. granting the earldom, and whole lands thereof, to George

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*h*) Royal Charter, dated 29th April 1601.

(*i*) Inſtrument of ſeiſin, dated 3d June 1601.

(*k*) Retour of the ſpecial ſervice of John Earl of Sutherland, dated 4th June 1616.

Lord Strathnaver, eldeſt lawful ſon of the ſaid John Earl of Sutherland, " et hæredibus ſuis maſculis cognomen de Gordon uten. et in-
" ſignia familiæ de Sutherland gerentibus, et aſſignatis ſuis quibuſcun-
" que;" and in virtue of a precept proceeding upon the ſaid charter, George Lord Strathnaver was infeoffed in the eſtate of the earldom (*l*).

In 1681, this George Lord Strathnaver, then become Earl of Sutherland, obtained upon his own reſignation a charter from King Charles II. of the earldom, and whole lands thereof, in favour of John Lord Strathnaver, his only lawful ſon, " et hæredibus maſcu-
" lis legitimè procreatis ſeu procreandis inter eundem Joannem Do-
" minum Strathnaver, et Dominam Helenam Cochrane, ejus ſpon-
" ſam; quibus deficientibus, hæredibus maſculis per dictum Domi-
" num Strathnaver in quovis alio legitimo matrimonio legitimè pro-
" creand.; quibus deficientibus, dicto Georgio Comite de Suther-
" land, et hæredibus maſculis ex ejus corpore cum Domina Jeanna
" Wemyſs, Comitiſſa de Sutherland, ejus ſponſa, vel in quovis alio ma-
" trimonio legitimè procreat. vel procreand.; quibus deficientibus,
" hæredi fœmellæ natu maximæ legitimè procreat. vel procreand. per
" dictum Joannem Dominum Strathnaver, cum præfata Domina
" Helena Cochrane, ejus ſponſa, ſine diviſione, et hæredibus maſ-
" culis ex ipſius hæredis fœmellæ corpore legitimè procreand.; qui-
" bus deficientibus, filiæ legitimæ natu maximæ ejuſdem hæredis
" fœmellæ, et hæredibus maſculis ex ejus corpore legitimè procre-
" and.;" and failing theſe, to the Earl's heirs-female, and to ſeveral other heirs and ſubſtitutes therein named (*m*).

In virtue of a precept proceeding upon the foreſaid charter, the ſaid John Lord Strathnaver was infeoffed in the ſaid earldom 23d May 1687 (*n*).

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*l*) Royal Charter, dated 21ſt February 1662; and inſtrument of ſeiſin, dated 28th April 1662.

(*m*) Royal charter, dated 24th June 1681.

(*n*) Inſtrument of ſeiſin, dated 23d May 1687, reciting the precept from the chancery *verbatim*.

In

In March 1706, the ſaid John, the 15th Earl of Sutherland, obtained, upon his own reſignation, a charter, under the great ſeal, of the whole earldom, and lands thereof, in favour of William Lord Strathnaver, his only ſon, " et hæredibus maſculis procreatis ſeu " procreandis inter illum et Dominam Catharinam Moriſon, ſponſam dicti Gulielmi Domini Strathnaver; quibus deficientibus, " hæredibus maſculis legitimè procreandis per dictum Gulielmum " Dominum Strathnaver cujuſvis alius maritagii; quibus deficien- " tibus, dicto Johanni Comiti de Sutherland ſibi ipſi, et hæredibus " maſculis legitimè procreandis ex ſuo corpore; quibus deficienti- " bus, hæredi fœmellæ natu maximæ legitimè procreandæ ex corpore " dicti Gulielmi Domini Strathnaver, natu maxima ſemper ſucce- " den. ſine diviſione, et hæredibus maſculis ex ejus corpore," &c.; and, failing theſe, to the Earl's heir-female, and ſeveral other heirs and ſubſtitutes therein mentioned (*o*).

Upon this charter infeoffment was taken 27th May 1707 (*p*).

William Lord Strathnaver, the grantee of the foreſaid charter, having predeceaſed his father, was ſucceeded by his ſon,

William, the 16th Earl of Sutherland; who, in 1723, was ſerved heir to William Lord Strathnaver, his father, and was duly infeoffed 12th January 1737 (*q*).

He died in 1750, and was ſucceeded by his ſon,

William, late Earl of Sutherland; who died 16th June 1766, leaving the claimant, his only child, then an infant one year old (*r*).

From this ſummary of the hiſtory of the family, it evidently appears, that from the year 1347, (the date of the firſt grant now extant), down to the year 1601, the eſtate of the earldom was held

By the title-deeds, the eſtate of the earldom was ſettled upon *heirs-general* from 1347 to 1601.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*o*) Royal Charter, dated 29th March 1706.

(*p*) Inſtrument of ſeiſin thereon, dated 27th May 1707.

(*q*) Retour of the ſpecial ſervice of William Earl of Sutherland, dated 7th January 1723. Inſtrument of ſeiſin, 12th January 1737.

(*r*) To be proved by parole-evidence.

under

under a ſeries of deeds, the limitations of which are either *to the heirs of the marriage*, where a marriage gave occaſion to the inſtrument; or to *heirs generally*, by the words *hæredibus ſuis*, or *hæredibus quibuſcunque*, or *hæredibus et aſſignatis quibuſcunque*, where the inſtrument took its riſe from family-ſettlements between the anceſtor and the preſumptive heir. It appears alſo, that in a conveyance of particular lands in 1400, as an appanage to a younger ſon of the family, though the lands are limited to him and the *heirs-male* of his body, the reverſion is limited *to the Earl and his heirs.*

It may therefore be aſſumed, as a certain propoſition in fact, that at the death of Earl John in 1514, the whole eſtate of the earldom, both in poſſeſſion and reverſion, ſtood limited to *heirs-general.*

The point then to be proved is, That Eliſabeth, the ſiſter and heireſs of Earl John, was intitled to the honour *in her own right*, as it is certain ſhe was intitled to the eſtate.

It would perhaps be ſufficient to ſhew, that the dignity was enjoyed by her and her deſcendents, and to call upon thoſe who diſpute her right, to prove, that there was any new creation of the honour, in favour either of her or of her huſband; and if no ſuch creation can be proved, the concluſion from thence ſeems abſolutely certain, that the ancient honour was derived to Lady Eliſabeth from her anceſtors, and from her to her deſcendents; conſequently the claimant will be intitled. But the claimant will go further; and, by eſtabliſhing juſt principles, will refute the chimerical notions on which the claims of both her antagoniſts muſt be grounded: For Sir Robert Gordon, as well as the other claimant, muſt found his pretenſions upon a ſuppoſed predilection in the law of Scotland to the male ſucceſſion, by which Lady Eliſabeth was excluded; though that argument is deſtructive of his own claim, if the exiſtence of an heir-male to Earl John is made out by the other claimant Mr Sutherland of Forſe.

The

The claimant propoſes to arrange her own arguments, and her anſwers to the arguments of her competitors, under the following general heads.

1. Female ſucceſſion in land-eſtates always the law of Scotland.

2. In early times, juriſdictions have deſcended to females.

3. A grant of an eſtate *hæredibus ſuis*, meant *to heirs-general.*

4. Connection between lands and titles of honour.

5. Titles of honour deſcendible to females.

6. Examination of the reaſons of preference urged by Sir Robert Gordon.

7. No preſumption for the creation of Adam Gordon can ariſe from the circumſtance of his aſſuming the title of *Earl of Sutherland.*

CHAPTER I.

Female Succeſſion in Land-eſtates always the law of Scotland.

AS far as hiſtory and records reach, the female ſucceſſion in land-eſtates is found eſtabliſhed in the law and uſage of Scotland.

Authority and uſage are the only evidences of the common law of a kingdom.

Here the claimant has a wide field out of which to gather her examples: the chief difficulty is in the ſelection.

Under this head the claimant will produce, 1. Authorities from ancient law-books and ſtatutes; 2. General evidence of female ſucceſſion from hiſtory and record; 3. Particular inſtances; 4. She will ſhew, that this is confirmed by the opinion of the more ancient writers who have treated of the law of Scotland; and, 5. She will ſuggeſt a probable reaſon, why female ſucceſſion in land-eſtates is found eſtabliſhed in Scotland as far back as hiſtory and records reach.

SECTION I.

Female Succeſſion in Land-eſtates by ancient law-books and ſtatutes.

Female ſucceſſion by ſtatute, &c.

IN ſupport of this propoſition, the authorities from ancient law-books and ſtatutes are numerous and invincible.

Regiam Majeſtatem is recogniſed as authoritative by the 54th act, parl. 3. James I. 1425. In that treatiſe female ſucceſſion is eſtabliſhed expreſsly, and without poſſibility of ſubterfuge.

Thus, l. 1. c. 25. § 23. "Proximi hæredes alicujus ſunt, quos ex "ſuo corpore aliquis procreavit, ut filius et *filia*; quibus deficienti-"bus, vocantur hæredes remotiores, ut nepos et *neptis*, ex filio et *filia* "rectâ lineâ deſcendens, et ita in infinitum, &c.".

Female ſucceſſion by ſtatute, &c.

L. 2. c. 28. § 1.—3. " Idem dicendum eſt de filia una relicta " quod eſt de uno filio."

§ 2. " Si autem quis plures habuerit *filias*, *inter eas dividetur* " *hæreditas*, *ſive fuerit miles*, ſive ſoccomannus, burgenſis, ſive alius " liber homo, pater earum."

§ 3. " Salvo tamen meſſuagio capitali *primogenitæ* ſub forma " præſcripta."

L. 2. c. 29. § 1. 2. " Maritus *primogenitæ filiæ* faciet homagium " capitali domino de toto feodo."

§ 2. " Tenentur autem *poſtnatæ filiæ*, vel ejus [earum] mariti, " ſervitium ſuum de toto tenemento capitali domino facere, per ma- " num *primogenitæ filiæ*, vel ejus mariti."

To the ſame purpoſe the claimant might quote l. 2. c. 30. 32. 34. 41. 42. [§ 2.] 48. 49. 55. [§ 2.] 57. [§ 10.] 58. 59. 60. [§ 3. 4.] 66. 70.

Exception may be taken at all thoſe paſſages, becauſe ſimilar enactments and proviſions are to be found in Glanville.

Suppoſing *Regiam Majeſtatem* to have been copied from Glanville, where-ever its tenor is ſimilar to that of *Regiam Poteſtatem*; this will derogate from the antiquity, but not from the authority, of *Regiam Majeſtatem*.

The Scottiſh legiſlature might imperceptibly adopt the compoſition of a private man, drawn up from the law of England, as the whole Chriſtian world adopted the decretals of Gratian.

No one has hitherto been ſo extravagant as to affirm, that *Regiam Majeſtatem* ſpeaks after Glanville even where Glanville is ſilent; and therefore the claimant will tranſcribe one paſſage more from *Regiam Majeſtatem*, which, ſhe imagines, is not to be found in Glanville.

L. 2. c. 31. " Porro contingit quandoque, quod ſi quis plures " habuerit uxores, et ex qualibet filiam vel filias generaverit, tum " *omnes filiæ venient pariter ad hæreditatem*, eodem modo ac ſi omnes " eſſent ex eadem matre."

§ 2. " Et hoc intelligendum eſt *de hæreditate veniente ex parte* " *patris*."

§ 3.

§ 3. " Nam ſi *hæreditas deſcendat ex parte matris*, filia illius ma- " tris ſuccedet in totam hæreditatem."

Female ſucceſſion by ſtatute, &c.

The claimant will now mention ſome authorities not mentioned in her former caſe, where Glanville and the law of England can have no concern.

There is an ancient treatiſe of the law of Scotland, termed, from its firſt words, *Quoniam attachiamenta:* in authority it is held to equal *Regiam Majeſtatem.*

The following paſſages tranſcribed from it relate to female ſucceſſion.

C. 20. " Nullus uxoratus poteſt alienare *hæreditatem uxoris ſuæ*, " *neque terram ejus:* quod ſi fecerit, poſt mortem ſuam, uxor ipſa, " vel *hæredes ſui*, poſſunt jure revocare illam alienationem; cum ip- " ſa fuiſſet ſemper ſub virga mariti ſui quamdiu vixerat maritus, " et ipſe fuit dominus omnium quæ fuerunt uxoris ſuæ, pro vita " ſua duntaxat."

C. 38. " Si aliquis homo vocaverit *aliquam ſponſam in warrantum* " *de placito terræ*, quæ mulier eſt legitimæ ætatis, et vir ſuus minor, " et infra ætatem viginti unius anni, quæritur, utrum illa teneatur " reſpondere ibidem ſine viro ſuo, aut eſſe in warrantizatione?"

§ 2. " Ad hoc reſpondetur, quod illa debeat comparere ad wa- " rantizandum tanquam waranta, videlicet, in illo caſu, *ubi terra* " *movetur ex parte ſua*, et non ex parte viri ſui."

C. 89. " Si homo, terram habens et tenementum, generaverit ex " uxore deſponſata unam filiam; mortuâ illâ uxore, capit aliam ux- " orem, de qua generat filium et filiam; mortuo autem patre ipſo- " rum, filius tanquam hæres intrat in hæreditatem paternam, et ita " eſt in ſaſina per annos et dies; tandem moritur iſte filius *ſine hære-* " *de de corpore ſuo:* iſta hæreditas non dividetur inter iſtas ſorores; " *quia ſoror illius quæ eſt de uno patre et de una matre ſecum nata, to-* " *tam hæreditatem, ratione ſui fratris, habebit*, et alia ſoror nihil de ea- " dem, ratione patris, obtinebit."

This paſſage alſo ſerves to aſcertain, beyond poſſibility of doubt, the meaning of the phraſe *hæres de corpore.* Had the brother, in the caſe

Female ſucceſſion by ſtatute, &c.

caſe put, left a daughter, it is obvious, that the ſiſters could at no rate have had any claim to the ſucceſſion.

C. 92. " Si aliqui domini maritaverint *hæredes* ſuos, quos vel " *quas habent in cuſtodia*, villanis vel burgenſibus, ubi diſparagentur; " ſi talis hæres ſit infra quatuordecim annos, et talis ætatis quod " conſentire non poſſit, tunc, ſi parentes ejus conquerantur, domi- " nus ille amittet cuſtodiam uſque ad ætatem hæredis."

C. 94. " Si alicui minori deſcendit hæreditas ex parte patris, qui " tenet de uno domino; et alia *hæreditas ex parte matris*, quæ tenet " de alio domino; ſtatutum eſt de cætero, quod ille dominus ha- " beat maritagium hæredis de quo anteceſſor ſuus ex parte patris " vel *matris* fuit prius feofatus; *non habendo reſpectum ad ſexum*, nec " ad quantitatem hæreditatis, ſed tantummodo ad *antiquius feofa-* " *mentum per ſervitium militare*."

C. 95. " De pueris, ſive maſculis ſive *femellis*, quorum *marita-* " *gium ad aliquem pertineat*, raptis et abductis," &c.

Statuta Alex. II. 1214. c. 22. " Vidua, poſt mortem mariti ſui, " ſtatim, et ſine difficultate aliqua, habeat maritagium et *hæredita-* " *tem ſuam*."

§ 2. " Nec aliquid det pro dote ſua, maritagio ſuo, *vel hæreditate* " *ſua, quam hæreditatem ſuam maritus ſuus et ipſa tenuerunt* die obitûs " mariti ſui.

C. 23. " Nulla vidua diſtringatur ad ſe maritandum, dum vo- " luerit vivere ſine marito; ita tamen quod ſecuritatem faciat de " non maritando ſe ſine aſſenſu noſtro, *ſi de nobis tenuerit*, vel ſine " aſſenſu domini ſui, *ſi de alio teneat* quam de nobis."

Statuta Robert. I. c. 23. [1319]. " Quia ante iſta tempora, bre- " ve de recognitione non jacuit niſi de morte ſex perſonarum, vi- " delicet, de morte patris, *matris*, fratris, *ſororis*, avunculi, *amitæ*, " ordinatum eſt et aſſenſum, quod de cætero habeat demandans " breve de recognitione, ita bene de morte avi et *aviæ*, ſicut de mor- " te patris et *matris*."

Statuta David. II. c. 23. De his quæ impediunt breve de nova diſſaiſina, § 4. " Si ipſa terra vel tenementum movetur *ex parte uxoris*,

" *uxoris*, et nomen uxoris non nominetur infra breve Domini Regis, " ipſum breve non ſtabit." Female ſucceſſion by ſtatute, &c.

Statuta Robert. III. [1400]. c. 20. § 4. " Et ſciendum eſt, quod " ipſæ viduæ poſſunt legare blada ſua de terris ſuis, tam de dotibus, " quam *de aliis terris et tenementis ſuis.*"

C. 35. " Contingit aliquando, quod aliquis habet duas vel " plures filias, et ipſe pater dat uni earum aliquam partem terræ " ſuæ, et poſtea moritur, unde contentio oritur inter ſorores."

§ 2. " Quia ipſa, quæ nihil habet de feofamento patris ſui, vult, " quod ea pars quam earum ſoror habet de feofamento, compute- " tur *in parte ſua*, aut quod ipſa ſoror ponat ipſam partem, ſibi " datam per patrem ſuum, in communi inter ipſam et reliquas ſo- " rores, ita quod omnes cædem ſorores habeant inde partem ſuam."

§ 3. " Et contra, ſoror nititur tenere illam partem, tanquam " ſuam, ſeparatam et diſtinctam, ſicut hoc *quod non eſt de hæredi-* " *tate patris ſui*, unde pater ſuus non fuit ſaiſitus tempore mortis " ſuæ; et ideo videtur ſibi, quod, licet pater ſuus dederit aliquam " partem terræ ſuæ, ipſa propter hoc non excluditur a jure ſuo de " hæreditate patris ſui," &c.

Upon the ſame principles of female ſucceſſion it was, that in 1476 James III. revoked in parliament all lands, &c. and " taillies maid " in his tender age, *frae the righteous aires.*" Parl. 9. c. 71.

Thus alſo, in 1493, James IV. revoked in parliament " all tailzies " maid frae the *aires-general* to the aires-male of ony landis in the " kingdom." Parl. 4. c. 51.

Unleſs, upon the ſuppoſition that the ſucceſſion of *heirs-general* was eſtabliſhed by the law of the land, ſuch revocations would have been unmeaning and abſurd.

SECT. II.

General evidence of Female Succeſſion to Land-eſtates in early times.

I. THE *firſt* evidence of female ſucceſſion by the ancient law of Scotland, which Lady Eliſabeth ſhall produce, is ſo direct and ſatiſ- General evidence of female ſucceſſion

General evidence of female ſucceſſion

factory, that it may ſeem to ſuperſede the neceſſity of any farther evidence.

Had *it* been known to ſome perſons, who have received from others, like themſelves, the appellation of *antiquaries*, the world would long ere now have been freed from much looſe reaſoning as to the modes of ſucceſſion by the ancient law of Scotland.

The evidence is no other than a *breve de inquiſitione* iſſued by Alexander III. in 1271, and the retour to that *breve* proceeding upon an inqueſt of fifteen jurors.

This valuable, and hitherto neglected inſtrument, runs thus: " Omnibus Chriſti fidelibus præſens ſcriptum viſuris vel audituris, " Walterus Seneſcallus, Comes de Menthet, ſalutem in Domino " ſempiternam. Noverit univerſitas veſtra me mandatum Domini " mei Alexandri, Dei gratiâ, illuſtris Regis Scotiæ, recepiſſe, in hæc " verba: *Alexander, Dei gratiâ, Rex Scotiæ, Waltero Comiti de Men-* " *thet, dilecto et fideli ſuo vicecomiti et ballivis ſuis de Dunbretan, ſa-* " *lutem. Mandamus vobis et præcipimus, quatenus per probos et fideles* " *homines patriæ diligenter et fideliter inquiri faciatis, ſi Maria ſponſa* " *Johannis de Wardroba, et Elena ſponſa Bernardi de Erth, ac Forveleth* " *ſponſa Norrini de Monorgund, filiæ quondam Finlai de Camſi,* SINT LE- " GITIMÆ ET VERÆ HÆREDES *quondam Dufgalli, fratris Maldoveni* " *Comitis de Levenax; et dictam inquiſitionem diligenter factam, et in* " *ſcriptis redactam, ſub ſigillo noſtro* [*l. veſtro*], *et ſigillis eorum qui dictæ* " *inquiſitioni intererint, ad capellam noſtram mitti faciatis, et hoc breve.* " *Teſte meipſo, apud Kynclewyn, 24to die Aprilis, anno regni noſtri 22do.* " Hujus igitur auctoritate mandati, per ſacramenta Dominorum Hu- " gonis Flandrenſis, Alexandri de Dunhon, Roberti de Culthon, Mi- " litum, Gilberti filii Abſolonis, Duncani filii Amaledy, Malcolmi " de Drumman, Malmer dicti juvenis, Gilmythel Machedolf Adæ " dicti juvenis, Duncani filii Gilchriſt, Thomæ filii Somerledy, " Newyn Mackeſſan, Maldoveni Macdawy, Hectoris Macſoukyn, " Eugenii aurifabri, ſuper præmiſſis diligentem feci inquiſitionem, " per quorum ſacramenta ad Sancta Dei Evangelia corporaliter præ- " ſtita, veraciter didici et compertus ſum, PRÆDICTAS MULIERES " VERAS ET LEGITIMAS HÆREDES ESSE prænominati Dufgalli,

" PER

" PER LINEAM CONSANGUINITATIS DESCENDENDO, ex parte Mal- General evi-
" colmi fratris prædicti Dufgalli, et avi prædictarum mulierum, et dence of fe-
" ipſum Dufgallum uxorem deſponſatam minimè habuiſſe. Et ne male ſucceſſion
" dicta inquiſitio per me facta cæcâ oblivione depereat, gratiâ ma-
" joris teſtimonii, tam ego, quam prædicti Milites, necnon et Dun-
" canus filius Ameledy, et Malcolmus de Drumman, præſens ſcrip-
" tum ſigillorum noſtrorum appoſitione roboravimus. Acta apud
" Dunbretan, die Veneris proximâ ante feſtum Sancti Dunſtani Ar-
" chiepiſcopi, anni gratiæ milleſimi ducenteſimi ſeptuageſimi primi;
" his teſtibus, Domino Johanne de Herchyn, Milite; Domino A-
" damo Capellano Caſtri de Dunbretan; Gilpatrick Macmolbrid,
" Ricardo de Dunydovern, Nicholao filio Germani, Wdardo dicto
" Selyman, Wilelmo de Cragbayth, Clemente de Dunbertan, Wal-
" tero de Orreis, Hyngelramo de Monte Acuto, et aliis mul-
" tis (*a*)."

If theſe inſtruments do not prove, that in the thirteenth century female ſucceſſion was eſtabliſhed in the law and practice of Scotland, the claimant is at a loſs to diſcover by what evidence any hiſtorical fact can be proved.

Sir Robert Gordon has objected to ſome examples of peerages enjoyed by females in the former part of the thirteenth century, be- p. 32.
cauſe they *are beyond the time of record.* He cannot object to this record reſpecting female ſucceſſion. The claimant meets him at the firſt dawn of record, and ſhews female ſucceſſion even then eſtabliſhed *per lineam conſanguinitatis.*

II. One of the caſes put by Edward I. to the foreign lawyers, in the controverſy between Bruce and Baliol, is ſtated thus. " Suppo-
" ſing the caſe in iſſue to be new, and hitherto undetermined, al-

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*a*) *Chart. Paſley*, fol. 114. *Walterus Seneſcallus Comes de Menthet*, mentioned in this breve and retour, is Walter Stewart Balloch, Earl of Menteith, in right of his wife, concerning whom there is a ſection in Lady Eliſabeth's caſe, ch. 5. § 3.

though

General evidence of female ſucceſſion

" though a ſimilar caſe may have occurred frequently among ſub-
" jects, *ſuch as Earls, Barons, and others, quær.* Ought judgement
" concerning the ſucceſſion of the kingdom itſelf to be given ac-
" cording to that cuſtom which has obtained in *earldoms, baronies,*
" *and other inheritances within the kingdom* (*b*)?"

The queſtion is, Whether the ſon of the daughter of the eldeſt daughter, or the ſon of the ſecond daughter, ought to ſucceed? This caſe Edward I. ſuppoſed to have frequently happened as to *Earls and Barons in the ſucceſſion of earldoms and baronies.*

Had Edward I. been aſſiſted by Sir Robert Gordon's counſel, he never would have put a queſtion ſo *unfeudal*; they would have informed him, That Scotland, a province conquered by the Germans, had derived the Longobardic cuſtoms pure from the ſource; that earldoms were perſonal offices; that baronies, from the nature of the thing, were limited to *heirs-male*; and conſequently, that the caſe which the King imagined to have occurred frequently, could never have occurred at all. So much better informed may one become by conſulting ſome theoretical writer, than Edward I. and his miniſters were five hundred years ago; and ſo much eaſier is it to frame a theory, than to accommodate that theory to hiſtorical facts.

III. It is ſingular, that that very doctrine which Sir Robert Gordon's counſel have maintained, was communicated to Edward I. by certain foreign lawyers, utterly unacquainted with Scotland, its laws, and cuſtoms.

Magiſter Salinus, Magiſter Tancretus, and Magiſter Reverius de Senis, laid their ſage heads together, and turned over, with great

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*b*) *Fordun.* lib. 11. c. 5. " Si in caſu in quo ſunt iſti petentes regnum Scotiæ, non
" ſit obtenta hactenus aliqua conſuetudo, quia caſus iſte, vel ſimilis, quoad ſucceſſionem
" regni Scotiæ, ante hæc tempora, non emerſit, licet *fortè quoad ſubditos ejuſdem regni, puta*
" *Comites, Barones, et alios, ſæpius accidat talis caſus*; numquid, ſecundum *conſuetudinem*
" *obtentam in comitatibus, baroniis, et aliis* hæreditatibus dicti regni, judicandum erit de
" ſucceſſione dicti regni?"

deliberation,

deliberation, the book *De uſibus feudorum. There* they diſcovered, that neither a female, nor the iſſue of a female, can pretend to the ſucceſſion of a feud, *tit. De gradibus ſucceſſionis in feodum*, c. 1.; and conſequently that the feud, i. e. the kingdom of Scotland, had devolved to the *over-lord* (*c*). General evidence of female ſucceſſion

Edward I. is held up to poſterity as the model of a politic prince, ſagacious and enterpriſing, ready to ſnatch, and able to improve, every opportunity. Had he perceived in the cuſtoms of Scotland any circumſtance analogous to the Longobardic law in the matter of female ſucceſſion, he would have aſſerted his pretenſions of over-lord; have pronounced to Baliol, as he did to Bruce, *Quod nihil capiat*; and have choſen for his vaſſal the feebleſt or the moſt obſequious of the competitors.

IV. During the reign or uſurpation of Edward I. many land-eſtates in Scotland were enjoyed by women, and by their huſbands in their right. Of this the quotations ſubjoined, from Rymer and Prynne, afford full and ſatisfactory evidence (*d*).

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*c*) *Fordun*, lib. 11. c. 7. "Librum de uſibus feudorum *plenius revolventes*, — invene-"runt, quod fœmina, vel proles ex ea deſcendens, ad ſucceſſionem feodi aſpirare non po-"teſt; ut in dicto libro, tit. *De gradu ſucceſſionis in feodum*, c. 1. Et ſic hujus feodi ſuc-"ceſſio — revertetur ad dominum ſuperiorem illius feodi." The opinion is here abridged. Any one who is inclined to peruſe it at full length, may conſult either *Fordun*, or Sir Robert Gordon's caſe.

(*d*) "Edwardus, &c. Terras et tenementa quæ Euſtachia [uxor Reginaldi le Cheine, de-"functi] ante, tam in dote, quam *de hæreditate ſua*, in prædicto regno et terra tenebat — "eidem reddi, et deliberari facias indilate." *Rymer*, t. 2. p. 727. an. 1296.

Thirty-ſeven grants of a like tenor are made to widows. *Rymer*, ibid.

"Edwardus, &c. Mandamus vobis, quod de terris et tenementis quæ Ricardus Syward "tenuit die quo contra nos captus fuit, tam de hæreditate ſua, quam *de hæreditate* et dote "Mariæ *uxoris ſuæ*, — aſſignari faciatis eidem Mariæ 40 libratas terræ." *Rymer*, t. 2. p. 728. an. 1296.

Nine others, wives of priſoners, have ſimilar grants. *Rymer*, ibid.

In *Prynne*, vol. 3. p. 654. *et ſeqq.* there is a liſt of thoſe who did fealty to Edward I. In this liſt there occur Alice de Ormeſton, Mabille de Congilton, Eleyne de Dudingſton, Eliſabeth de Spot, [all conſiderable eſtates in the Lothians], and about thirty more. In that number widows are not reckoned. It is to be preſumed that thoſe were unmarried ladies; becauſe the huſbands of the married ladies would have yielded fealty in their ſtead.

General evidence of female ſucceſſion

By the treaty of Northampton, 1328, it was provided, "Tha no "Engliſhmen ſhould poſſeſs eſtates in Scotland, unleſs they reſided "within that kingdom, and did fealty *there* (*e*)." To this article of the treaty, many Engliſh nobles objected: they conſidered it, and juſtly, as importing, that Engliſhmen ſhould loſe ſuch lands as *they had by inheritance in Scotland* (*f*). There were, however, political reaſons which moved Queen Iſabella and Mortimer to precipitate the peace with the Scots; and therefore the exceptions taken by the Engliſh nobles were diſregarded. They who, by remaining in England, loſt their Scottiſh eſtates, were called the *diſinheretes* (*g*).

In 1332, the *diſenheretes* ſought to recover their eſtates in Scotland: they joined Edward Baliol, invaded Scotland, conquered the whole kingdom, excepting one fortreſs and four caſtles, and placed Baliol on the throne (*h*).

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*e*) *Tyrrel*, Hiſtory of England, vol. 3. p. 351.

(*f*) "Theſe Lordes, Percy, Wake, Beaumont, and Souche, wold not agre upon this "condition, that the Engliſchmen ſhould leſe ſuch landes as *they had by enheritance yn* "*Scotland*." *Scalæ Chronicon*, apud *Leland*, Collectanea, vol. 1. p. 794.

(*g*) "The names of the *diſenheretes* in Scotland. Syr Henry Beaumont Erle of An"gous [Angus], Syr Davy of Scroby, [miſread for the contraction of *Strathbolgie*], "Erle of Atheles [Athole], &c. temp. Edw. III." *Chronicle in Peterhouſe*, apud *Leland*, Collectanea, vol. 1. p. 478.

This "Henry de Beaumont, about 1 Edw. II. [1306], took to wife Alice, one of the "coſins and heires to John Earl of Boghan [Buchan] Conſtable of Scotland; and in 6 "Edw. II. [1311] doing his hommage, had livery of the lands of her inheritance, clauſ. "6. E. 2. m. 19." *Dugdale*, Baronage, t. 2. p. 50. It is preſumed, that the lands here meant are thoſe which the Earl of Buchan held in England. The genealogy of Henry de Beaumont is to be found in *Burton*'s Antiquities of Leiceſterſhire, p. 37.

"John Comyn of Badenoch died 19 Edw. II. leaving Joane, wife of David de Strath"bolgie Earl of Athole, then thirty years of age, and Eliſabeth, her ſiſter, twenty-ſix "years of age, his ſiſters and next heirs; which Eliſabeth afterwards became the wife of "Richard Talbot." *Dugdale*, Baronage, t. 1. p. 686.

(*h*) "Eodem anno 1332, convenerunt quidam Magnates Angliæ, qui clamaverant ha"bere terras in regno Scotiæ jure hæreditario; et Rex Edwardus hoc ſuſtinuit; non ta"men eos apertè juvare potuit. *H. Knyghton*, apud *Twiſden*, p. 2560. Tunc iſti domi"ni clamantes terras in Scotia, ſcilicet, Dominus Edwardus le Baliol, qui jure hæredita"rio clamavit regnum Scotiæ, Comes de Athedell, Dominus Henricus de Bealmont, &c. "et plures alii, cum trecentis armatis, et tribus mille de omni genere peditum, applicue"runt in Scotiam VII die Auguſti," &c. *Knyghton*, ibid.

In

In 1334, Henry Beaumont, the Earl of Athole, and Richard Talbot, quarrelled with Baliol. The cauſe of the quarrel was, that Baliol had preferred Alexander de Moubray to the poſſeſſion of certain lands, in prejudice of the daughters of his brother, who were *the right heirs by the law of ſucceſſion.* This diſcord terminated in the ruin of Baliol's fortunes, and in the expulſion of the *diſinheretes* themſelves (*i*). General evidence of female ſucceſſion

Thus, it appears, that female ſucceſſion was no novelty in Scotland about the commencement of the fourteenth century; that, on the contrary, the prevalency of it, and the conſequences thence ariſing, went near to overthrow that government which all the valour and indefatigable toils of Robert Bruce had with much difficulty eſtabliſhed.

SECT. III.

Particular inſtances of Female Succeſſion to Land-eſtates in early times.

THE claimant now proceeds to offer ſome particular inſtances of female ſucceſſion in early times. Particular inſtances of female ſucceſſion

For the ſake of brevity, ſhe will confine herſelf to inſtances which occurred before the acceſſion of the family of Stewart.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*i*) " Eodem anno 1334, circa finem menſis Auguſti, apud Perth, mota eſt diſcordia " inter Edwardum de Balliolo, inſtantem pro Domino Alexandro de Moubray, et Domi- " nos Henricum de Bello-monte, David Comitem Atholiæ, et Richardum Talbot, niten- " tes prædictum Alexandrum ab hæreditate repellere, et filias fratris ſui, *veras hæredes* " *jure ſucceſſionis*, ſibi anteferre. Cujus rei causâ diſcordes facti ab invicem, receſſerunt." *Fordun*, lib. 13. c. 29. It will be remarked, that, in this paſſage, *ſibi* is erroneouſly uſed for *illi*. This error is frequent in *the baſe Latinity*.

" Henry Beaumont Erle of Boghan [Buchan] *by the inheritance of his wife*, went to " Dungarg, a caſtle that he had newly fortifyed yn Boghan.—Richard Talbot was beyond " the montaynes yn the landes *of the enheritance of his wife*, doughter to John Comyn of " Scotland.—Of all the Engliſch enheritors of Engliſchmen in Scotland, wer non left of " any great reputation." *Scalæ Chronicon*, apud *Leland*, Collectanea, vol. 1. p. 554.

In *Leland*, vol. 2. p. 9. there is an abſtract of a treatiſe, intitled, " How England " ſhould have homage and fealty of Scotland." In it there occurs the following paſſage: " Then drew to him [Edward Baliol] diverſe lordes and gentilmen, *the which had title to* " *dyvers landes there, other by themſelves, or by theyr wyves.*"

1. Before

Particular inſtances of female ſucceſſion

1. Before 1165, "Hugo de Lorens, et Eda uxor ejus, *filia et* "*hæres* Symonis Fraſer," made a grant of the church of Keith, together with a conſiderable tract of land in Eaſt Lothian, to the abbacy of Kelſo (*a*).

2. 1185, *Eſchina de Londoniis* made a grant of the abbacy of Kelſo. "*Cecilia de Molle*, filia Eſchinæ de Molle, the perſon laſt named, "tanquam Domina proprii juris, et vera hujus donationis hæres," made another grant to the ſame abbacy of certain lands, "in domi-"nio meo de Molle (*b*)."

3. Between 1195 and 1234, Elene de Morevill granted certain lands to the abbacy of Melros, in exchange for certain lands which William de Morevill her brother had deviſed to them by his latter-will. The grant contains this clauſe: "Et ipſi monachi remiſe-"runt *mihi*, *et hæredibus meis*, omnem calumniam quam habuerunt "contra nos."—"Alanus, filius Rollandi, Conſtabularius Regis "Scotorum," confirmed this grant made by his mother *Helen de Morevill* (*c*).

4. Before 1214, *Eſchina Domina de Molla*, granted to the abbacy of Paiſley, "unam carrucatam terræ, in territorio meo de Mol-"la (*d*)."

5. 1238, "Muriel de Pollock, filia quondam Petri de Pollock," granted a mill and a mill-dam to the hoſpital of St Nicholas: ſhe alſo granted to the ſame hoſpital, her lands of Innerorkill. "*Eva* "Domina de Rothes," confirmed her mother's grant (*e*).

6. 1246, Alexander II. in the 32d year of his reign, confirmed a

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*a*) *Chart. Kelſo*, fol. 33. This grant is confirmed by Malcolm IV. who died in 1165.

(*b*) *Chart. Kelſo*, fol. 56. & 57.

(*c*) *Chart. Melros*, fol. 56.

(*d*) *Chart. Paiſley*, fol. 44.

(*e*) *Chart. Morav.* vol. 1. fol. 71.

grant

grant made to the abbacy of Aberbrothock, by " Richenda *filia et* " *hæres* Umfridi de Berkeley, et Agathæ ſponſæ ſuæ." Particular inſtances of female ſucceſſion

The ſame " Richenda, filia Wynfridi de Bercley," confirmed " Rogero Wyrfaut totam terram illam quæ fuit Hugonis, filii Wal- " deni, in territorio de Cunweth; tenend. ipſis, et attornatis ſuis, " de me, et *hæredibus meis*, in feodo et hæreditate," confirmed by Alexander [II.], 9th March, *anno regni 2do*, 1250 (*f*).

7. 1253, " Thomas de Rettre, Miles," as attorney for *Chriſtina*, his wife, ſurrendered her right to the lands of Kincoldrum, in favour of the abbacy of Aberbrothock, and ſhe conſented to this ſurrender. There is a penalty provided, if Thomas or his wife, " vel " aliquis vel *aliqua hæredum*," ſhould call the ſurrender in queſtion (*g*).

8. Between 1253 and 1298, " *Eva* Domina de Rothes" granted the lands of Innerlochy to the cathedral church of Moray. This is plainly the ſame lady who inherited the lands of her mother, Muriel de Pollock, who again inherited the lands of her father, Peter de Pollock (*h*).

9. About 1270, " Alicia de Gordun, *filia et hæres* quondam Do- " mini Thomæ de Gordun, Militis, junioris," made a grant of lands to the abbacy of Kelſo. It confirms grants made by her great-grandfather, Richard, by her grandfather, Thomas, and by her father, Thomas (*i*).

10. 1275, Alan Durward [Oſtiarius] died, whoſe eſtates were divided among his three daughters (*k*).

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*f*) *Chart. Aberbroth.* vol. 1. fol. 28. *Chart. St Andrew's*, p. 425.

(*g*) *Chart. Aberbroth.* vol. 1. fol. 127. 128.

(*h*) *Chart. Morav.* vol. 1. fol. 49.

(*i*) *Chart. Kelſo*, fol. 43.

(*k*) *Fordun*, lib. 10. c. 35.

Particular inſtances of female ſucceſſion

11. 1281, There is extant a procuratory, whereby "Margareta "de Ardroſſe, filia Domini Marleſwan, quondam Domini de Inver- "gelly," reſigned her lands of Innergelly (*l*).

12. 1318, Robert I. in the 12th year of his reign, granted "Duncano Cambell, Militi, et Suſannæ ſponſæ ſuæ, omnes terras "ſuas de Loudoun et de Stevenſoun, cum pertinentiis, in Cuning- "ham, prædictos Duncanum, et Suſannam ſponſam ſuam, hæredi- "tariè contingentes, *ratione dictæ ſponſæ* (*m*)."

13. The ſame King granted "Ricardo dicto *Edger* capitale ma- "nerium, cum medietate totius baroniæ de Seneſchar [Sanquhar in "vicecom. de Dumfries] ad ipſum capitale manerium pertinente, "ſicut dicta baronia, inter Willielmum de Crechton, et Iſabellam "ſponſam ſuam, portionarios ipſius baroniæ, *ratione dictæ ſponſæ*, ex "parte una, et ipſum Ricardum ex altera, per literam ex capella "noſtra fuerat diviſa." Here there occurs an example of heirs-parceners, and of a *breve de diviſione* iſſued from the chancery (*n*).

14. 1321, "Agnes de Morthingtown, *filia et hæres* Domini Petri "de Morthingtown, Militis," having ſold her lands of Gillandriſtoun in le Garviach, [Garioch], "Johanni filio Adæ Druming," reſigned them "in pleno parliamento apud Perth (*o*).

15. 1345, David II. in the 15th year of his reign, confirmed a charter of the lands of Brakie and others, granted by Margaret Seneſcalli, Comitiſſa de Angus, *Domina de Abernethy*, to the abbacy of Aberbrothock, "pro ſalute animæ Domini mei Johannis Seneſcalli "quondam Comitis de Angus." The Counteſs warrants her donation thus: "*Ego vero* et hæredes mei defendemus, &c. (*p*)." It

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*l*) *Cart. Dryburgh*, fol. 5.

(*m*) *Roll, Rob. I.* N° 38.

(*n*) *Roll, Rob. I.* N° 27.

(*o*) *Roll, Rob. I.* N° 84.

(*p*) *Chart. Aberbroth.* vol. 1. fol. 137.

is

is well known, that this lady was the eldeſt of the three heirs-parceners of the Lord Abernethy, one of the moſt opulent barons of the fourteenth century. On account of this diviſion of the Abernethy eſtate, the repreſentatives of the heirs-parceners, the Earl of Craufurd, the Earl of Rothes, and Mr Douglas of Douglas, do at this day quarter *Abernethy*. Particular inſtances of female ſucceſſion

16. 1347, Catharine Biſſet having borrowed L. 40 Sterling from the abbacy of Dunfermline, renounced her right to L. 3, 9 s. Sterling out of the lands of Luſkyr-hunyoch, which belonged to her. She is ſtyled, " filia et *una hæredum* quondam Domini David de " Hynyoth, Domini de Clerkington (*q*)."

17. In the ſame year 1347, Chriſtina, her ſiſter, renounced a right of annualrent in Luſkyrhunyoch, belonging to her *jure hæreditario*: ſhe is ſtyled, " *filia et una hæredum* quondam Domini David de Hu- " nyoth," &c.

18. 1361, It appears, that one of theſe *heirs-general* were ſucceeded by another *heir-general*; for " Margareta de Onyoth, filia et " una hæredum quondam Domini David de Onyoth," granted to the abbacy of Dunfermline, " totam terram meam de Pethfuran, " ſibi jure hæreditario contingentem."

19. 1361, In a grant made by the Biſhop of Moray, mention is made of " ſex acræ ex dono Suſannæ et Edæ, *ſororum et hæredum* " Veteris Caſtri (*r*)."

20. 1387, The abbacy of Aberbrothock granted a charter of the lands of Forglen to John Fraſer, " et hæredibus ſuis de corpore ſuo " legitimè procreand. Quam quidem terram Gilbertus Urry, et Jo- " hanna ſponſa ejus, *hæres* quondam Marjoriæ, ſponſæ Johannis " Fraſer, *filiæ et hæredis* quondam Domini Johannis de Moni-

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*q*) *Char. Dunferm.* vol. 2. fol. 44. 45. 77.

(*r*) *Char. Morav.* vol. 2. fol. 97.

" muſk,

Particular inſtances of female ſucceſſion

" muſk, Militis, nobis per fuſtem et baculum reddiderunt (*s*)." *Here* are ſucceſſive female heirs, viz. *Joan*, the heir of *Marjory Fraſer*, and *Marjory*, the daughter and heir of *John de Monimuſk*, *Miles*. *Malcolm de Monimuſk*, in all probability, the immediate anceſtor of *John*, had a grant of thoſe very lands from the abbacy in 1314. The grant is conceived " eidem Malcolmo, et *hæredibus ſuis*." As mention is made in 1387 of two generations, it is probable, that the ſucceſſion opened to the heir-general before the acceſſion of the family of Stewart, 1370.

The dates of the inſtances of female ſucceſſion already given, have been aſcertained with tolerable accuracy, from the age at which the parties or witneſſes are known to have lived, or from the age of the different ſovereigns who confirmed them.

Some other early inſtances of female ſucceſſion, whereof the dates are not exactly known, ſhall be here ſubjoined.

1. Grant to the abbacy of Kelſo, by " Adam de Roule, et Jo- " hanna Wyſchard ſponſa ſua, *filia et hæres* quondam Domini Hen- " rici de Haliburton (*t*)."

2. Grant by " Ada, Emma, et Helena, *hæredes* Roberti de Kent," proprietor of Innerwick in Eaſt Lothian (*u*).

3. Grant by Agnes, " filia Johannis, filii Ranulphi de Karamund," bearing, " me, ex conſenſu et aſſenſu Willielmi hæredis mei, " dediſſe toftum meum, cum crofto ex aquilonali parte villæ de Kar- " ramound Scottorum." This lady has been a co-parcener; for there is a ſimilar grant by " Alicia filia Johannis filii Ranulphi (*v*)."

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*s*) *Char. Aber.* vol. 2. fol. 12. 24.

(*t*) *Char. Kelſo*, fol. 68.

(*u*) *Ditto*, fol. 101.

(*v*) *Char. Dunferm.* vol. 2. fol. 86. 90.

4. Mention

Particular inſtances of female ſucceſſion.

4. Mention is made of "Emma de Smithetun, *filia et hæres* quondam Gilliberti de Smithetun (*w*)."

5. John Keth entered a claim for the lands of Culback, "ratione *Margaretæ ſponſæ meæ* (*x*)."

6. Donald Earl of Lennox granted a charter of part of the lands of Porthelaine, "Gilberto Olifant, filio et hæredi Mariæ Olifant, et hæredibus ſuis (*y*)."

7. In the twelfth century, Roger de Scalebroc granted to the abbacy of Melros, the lands of Drumcleiſmene, and other lands, with his ſalmon-fiſhing in the river of Don [Doun in Airſhire]. The grant of the lands was confirmed by "Henricus filius Turſts, filii Leving, et Maria uxor ejus, *filia et hæres* Rogeri de Scalebroc." The grant of the ſalmon-fiſhing was confirmed by Roderic Macgilleſcop, and his wife, "Chriſtiana *filia* Rogeri de Scalebroc (*z*)."

8. Colinus Oſtiarius [Durward] granted to the church of Munimuſk, "totam dimidiam davach terræ, in qua ſita eſt eccleſia de Lothell; ego autem," ſays the grant, "et *hæredes mei*, præfatam terram prædictis canonicis, contra omnes homines et fœminas, warrantizabimus."

"Philippus de Monte Sicheter, et Anna uxor, *filia et hæres* Domini Colini Hoſtiarii defuncti," renewed this grant (*aa*).

9. "Hugo Abbas de Dunfermline," and the convent, granted "Mariotæ, filiæ et hæredi Ricardi Coci quondam burgenſis de Dunferm. *pro homagio et fideli ſervitio ſuo*, illam medietatem de Pelkbauchly, quam prædictus Ricardus, pater ſuus, quondam de nobis

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*w*) *Char. Dunferm.* vol. 2. fol. 88.

(*x*) *Char. Aberbroth.* vol. 2. fol. 21.

(*y*) *Char. Lennox*, N° 38. & 92.

(*z*) *Char. Melros*, fol. 46. 47. 48.

(*aa*) *Char. St Andrew's*, p. 518.

Particular inſtances of female ſucceſſion

" tenuit: Tenend. et habend. ſibi, et hæredibus ſuis:— Reddendo " — annuatim unam par calcarium alborum ;— facient ſequelam ad " curiam noſtram, et forinſecum ſervitium, quantum pertinet ad ter- " tiam partem unius davachæ terræ."

The particular examples of female ſucceſſion here produced are taken from ancient chronicles, chartularies of abbacies, and public records.—From our ancient chronicles, ſhort and imperfect, little information could be expected; few chartularies have been preſerved, and they could only mention ſuch heireſſes as were benefactreſſes to particular religious houſes; the records of thoſe early ages are ſcanty. Some judgement, however, may be formed of the multitude of examples of female ſucceſſion in early ages, from the number which have occurred in ſo narrow a field of inveſtigation.

Could the claimant demand inſpection of the title-deeds of the old families of Scotland, ſhe is confident that in almoſt every family, ſome inſtance of female ſucceſſion would be diſcovered. But ſhe has no right to demand ſuch inſpection; and as ſhe underſtands that where-ever it is poſſible, ſhe ought to produce the vouchers of her aſſertions, ſhe has confined her examples to ſuch as are patent to every one, and may be canvaſſed by her competitors.

Hundreds of examples of female ſucceſſion to lands in early ages are to be found in Sir James Dalrymple (*bb*), Crawfurd, Niſbet, Douglas, and the other writers on genealogy.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*bb*) For example, between p. 349. and 354. there are five inſtances of female ſucceſſion in as many pages.—*Craufton*; a fourth part of this barony came to William Watſon; and from him deſcended by marriage to Alexander Murray of Falla or Falla-hill.—*Craigie* came from Lindſay to Wallace of Riccarton by marriage.—Lindſay married the heireſs of *Ormiſtoun*;—and Cockburn, the heireſs of *Lindſay-Ormiſtoun*.—*Finlaſtoun* belonged to the Denniſtouns; it came by marriage to Cuningham of Kilmaurs.

SECT.

SECT. IV.

Opinion of the eldeſt writers on the law of Scotland, confirming the right of Female Succeſſion in Land-eſtates.

THE evidence in proof of female ſucceſſion by the law and uſage of Scotland has been fully opened and illuſtrated. Opinion of writers as to female ſucceſſion.

It is ſo extenſive, and ſo irrefragable, that the claimant ought to make ſome apology for ſeeking to confirm it by the opinion of any writer whatever.

Were the opinion of writers adverſe to a propoſition clearly eſtabliſhed in fact, it would derogate from the public eſtimation of the writers, not from the credibility of the fact.

She will therefore confine herſelf to a few paſſages from Balfour, Skene, and Craig, the eldeſt writers on the law of Scotland.

Sir James Balfour, Preſident of the court of Seſſion in the reign of Queen Mary, thus ſpeaks: *Practiques*, tit. *Heirs and Succeſſors*, p. 221. § 1. "Immediate heiris are the ſone *and the dochter*." And again, § 4. "Gif ony man deceis, leivand behind him *an dochter*, ſcho ſould ſucceed to him as aire to all and haill his heritage."

Sir John Skene, in his treatiſe, *De verborum ſignificatione*, voc. *Varda*, expreſſes himſelf in the following manner. "Touching the cuſtodie "and keeping of the perſon of the aire of ward-lands, or of ony landes, "or quhatſumever, *maill or femaill*, gotten or born in lauchfull mar- "riage, the ſamin perteines to the mother, after the deceaſe of the "father, untill the bairne be of the age of ſeven yeires compleit."

A little below, under the ſame head, he ſays, "The *air-femaill* is "in the ward and keeping of hir ſuperiour untill ſcho be fourteen "yeires of age,—at the quhilk ſche may lawfully marie, with con- "ſent of her ſuperiour; and therefore, being ſubject to her huſ- "band, it is not reaſon ſche ſuld be alſo ſubject to the warde of her "ſuperiour, and conſequentlie under twa wards, and twa ſundrie "ſeveral powers. Mair-over, ſche being married with conſent of

"her

Opinion of writers as to female ſucceſſion.

" her over-lord, *hir husband may doe ſik ſervice as ſuld be done to him* " *be the poſſeſſour of the landes*, quhilk is conform to that quhilk is " written be Doct. Thomas Smith, *Of the common weil of England*, " lib. 3. c. 5. 8."

More to the ſame purpoſe is to be found, vv. *Eneya* et *Maritagium*.

Craig, in his treatiſe *De Unione*, thus ſpeaks: " In fœminis idem " jus, in Anglia ſcilicet et in Scotia, *ut hæreditas inter filias et ſorores*, " aut alias, ſi non ſunt mares, et in æquis gradibus ſint, *in capita* " *dividatur*; *reſervatâ tamen filiæ maximæ natu ſuâ etiam prærogativâ*, " nempe, principali manſione defuncti, cui ſucceditur; nam ea in " diviſionem non venit; ut neque ſuperioritas vaſſallorum, *quæ tota* " *primogenitæ filiæ debetur*:—itaque in renovatione ſive continuatione " feudorum, nulla inter nos prorſus eſt differentia."

In another paſſage, ſpeaking of the eſtabliſhment of Engliſh families in Scotland, he obſerves, " Aliud tempus erat ſub Roberto " Bruſſio, cum tot ſanguinolenta prœlia, tot exercituum ſtrages, in- " ter Anglos et Scotos, pro execrando illo hominio, intercederent; " in quo, cum plerique viri fortes cecidiſſent, *relictis filiabus hæredi-* " *bus*, eas omnes in matrimonium iis Anglis tradidit, quos in exi- " lium Edwardus II. ejecerat, ut adverſæ culpam pugnæ a ſe in ſuos " rejiceret (*f*)."

This obſervation betrays a penury of hiſtorical knowledge; it ſerves, however, to ſhew what were the ſentiments of Craig as to the antiquity of female ſucceſſion, and the frequent examples of it in Scottiſh inheritances.

In his treatiſe *De feudis*, l. 2. dieg. 16. § 3. he defines a *feudum talliatum* thus: " Quod, *excluſis fœminis*, LICET VERI HÆREDES " SINT, hæreditatem ad maſculos vi proviſionis trahat."

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*a*) De Unione, fol. 47. 63. pr. 2. Theſe quotations are taken from a MS. copy of the age of Craig, probably the original, herewith produced.

He

He has theſe words in l. 1. dieg. 10. § 6. " An autem hic dici " poſſit, quod ſupra de feudo proprio diximus, nempe, ſemper præ- " ſumi maſculinum feudum, niſi conceſſio mentionem fecerit fœ- " minarum, quæri poteſt; cum feudum maſculinum ſit tantum " proprium feudum; quod quidem in jure ſemper præſumitur, niſi " contrarium exprimatur." Opinion of writers as to female ſucceſſion.

Here he ſpeaks of maxims laid down in the books of *Feuds*. But he adds, " USUS TAMEN NOSTER LONGE DISSENTIT; PRÆSU- " MIT ENIM FEUDUM AD FOEMINAS ÆQUE AC MARES DESCEN- " DERE, NISI EXPRESSE HÆREDIBUS MASCULIS FUERIT PROVI- " SUM."

Craig appears to have been ſo fully ſatisfied of the antiquity of female ſucceſſion, by the law and uſages of Scotland, that in l. 1. dieg. 8. § 2. he points out the traces of it in the ſuppoſed laws of Kenneth III. and of Macbeth.

There will be a more fit occaſion hereafter to examine that paſſage in Craig, where he treats of the ſuppoſed efficacy of the word *quibuſcunque* implied, although not expreſſed.

The claimant perhaps has been too diffuſe in eſtabliſhing the certainty of female ſucceſſion by the law and ancient uſages of Scotland. Whether it will *now* be diſputed, ſhe knows not. The only apology which ſhe can offer is this, that it ſeemed neceſſary to be guarded on every quarter againſt an antagoniſt who is continually ſhifting his ground.

SECT. V.

Reaſon for the prevalency of Female Succeſſion in early times.

THE claimant has proved, that female ſucceſſion actually prevailed in Scotland as far back as record and hiſtory reach: ſhe will now ſuggeſt a reaſon for its thus prevailing. Why female ſucceſſion prevailed.

Hiſtorical facts are often adapted to reaſons pre-ſuppoſed: the claimant has choſen an humbler method of inveſtigation; ſhe has

Why female ſucceſſion prevailed.

aſcertained the fact before preſuming to make any inquiry into the reaſon of it.

Although the *reaſon* which the claimant may ſuggeſt ſhould be held inadequate and unſatisfactory, her argument founded on the *fact* will not be impaired.

One great reaſon why female ſucceſſion prevailed in Scotland, may be found in the conſtant intercourſe between Scotland and England.

The claimant would not be underſtood to aſſert, that every part of the law of Scotland, as well as letters, modes of religious worſhip, and all improvements in civil life, was derived from England.

The intercourſe, however, between the two nations in ancient times was much greater than is generally ſuppoſed (*a*).

Before the reign of Malcolm III. all is darkneſs in the hiſtory of Scotland. From him then this inquiry concerning the intercourſe between the two nations may properly begin.

Malcom III. reſided in England for many years. By the aſſiſtance of the Engliſh he recovered his crown. He married an Engliſh princeſs, whoſe generous labour in civilizing the dominions of her conſort, is, and ever will be, affectionately remembered.

Their ſon David I. was educated in England, and reſided there until his acceſſion to the crown.

Malcolm IV. was the ally, and, though of tender years, the companion in arms, of Henry II. (*b*).

In 1189, Richard I. a prince of candour, renounced that claim of homage which Henry II. had extorted from William King of Scots during his captivity (*c*). This candour attached the generous ſpirit

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*a*) In the courſe of this collateral inquiry, no proofs or authorities will be given as to facts known and acknowledged; ſuch as, the manner of Malcolm Kanmore's reſtoration, the marriages of the Scottiſh kings, &c.

(*b*) *Fordun*, lib. 8. c. 3.

(*c*) *Rymer*, t. 1. p. 64. "Quietavimus et omnes pactiones quas bonus pater noſter Henricus, Rex Angliæ, per novas cartas, *et per captionem ſuam extorſit*." Money indeed may have been given; but ſtill the benefit was much greater than the money given.

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of William to the intereſt of Richard. From that happy æra in the Scottiſh annals, William was the faithful ally of England (*d*).

Why female ſucceſſion prevailed.

Alexander II. married a daughter of King John; Alexander III. a daughter of Henry III. Both lived in amity with the Engliſh court; both were politic and gallant princes.

For more than a century after 1189, *there was no national quarrel, no national war, between the two kingdoms.*

Indeed, by the acquiſition of land-eſtates, and by intermarriages, they had become one, as much as two nations under different rulers can become.

Malcolm III. and his ſucceſſors, entertained many an exiled Saxon, and many a diſcontented Norman Lord. The greateſt part of Scotland imperceptibly became the property of thoſe ſtrangers. At this day, moſt of the nobility of Scotland are of their blood.

Many of the Engliſh barons poſſeſſed opulent eſtates in both kingdoms; as De Quinci, De Ferreriis, De Valloines, Baliol, Bruce.

Some of them became all-powerful in Scotland, as the Cumins, an Anglo-Norman family, during the reigns of Alexander II. and Alexander III.

From the acceſſion of David I. to the death of Alexander III. the Chancellors of Scotland were generally of Norman or of Saxon original; as, William Cumin, *David I.*; Roger Biſhop of St Andrew's, brother of the Earl of Leiceſter, and William Malvicine Biſhop of St Andrew's, *William the Lion*; William de Boſcho, the miniſter of *William the Lion* and *Alexander II.*; William Fraſer Biſhop of St Andrew's, *Alexander III.* (*e*).

The office of Great Chamberlain, accompanied with very ample juriſdiction, was often enjoyed by Anglo-Normans; and in particu-

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*d*) *Tyrrel*, ad an. 1194. His brother David aſſiſted in ſuppreſſing the rebellion of John.

(*e*) *Crawfurd*, Officers of State, p. 7. 10. 11. 15.

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Why female ſucceſſion prevailed.

lar, from 1180 to 1234, without interruption, by Philip de Valloines, William de Valloines, and Henry de Baliol, all of Norman extraction, all poſſeſſed of eſtates in England (*f*).

While the Scottiſh kings were educated in England, or intimately allied with England, while moſt of their nobles and many of their miniſters were Engliſh, it is not ſtrange that the law of Scotland ſhould have reſembled that of England; it would have been ſtrange indeed if it had not. The ſucceſſion of females by the cuſtom of England in thoſe ages to lands, juriſdictions, and peerages, is ſo certain, as not to require any voucher from hiſtory or record (*g*).

Whether *Regiam Majeſtatem* be conſidered as an authentic body of law, compiled by authority of David I. or as the work of a private perſon about the time of Alexander II. or Alexander III. and afterwards approved by the legiſlature, the argument, as to the ſimilarity of the laws of the two nations, will not be varied.

Upon the *firſt* ſuppoſition, there can be no doubt; upon the *ſecond*, it muſt be admitted, that the private compiler would have been inſtantly detected, had his compilation differed much from the eſtabliſhed laws and practice of Scotland.

The diſputed ſucceſſion between Bruce and Baliol eſtranged the two nations: From allies, united together by every tie of blood and intereſt, they became enemies, implacable and inveterate.

The French endeavoured, and but too ſucceſsfully, to avail themſelves of this unhappy breach.

It was widened, on *the one hand*, by the eagerneſs of the Scots, in patroniſing every pretender to the Engliſh crown, as the falſe Richard II. and Perkin Warbeck; on the *other hand*, by the heavy

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*f*) *Crawfurd*, Officers of State, p. 254. 261.

(*g*) No one can peruſe ten pages of any provincial hiſtory of England, without diſcovering evidence of female ſucceſſion. Thus, among all the genealogies ſet forth by Dugdale, *Antiquities of Warwickſhire*, there will not be found above three or four, where an heir-female does not occur, either in the line of deſcent, or in the line of marriages.

exaction

exaction for the ranſom of that weak prince David II. and by that extravagant bill of charges which Henry IV. of England reared up againſt James I. (*b*).

Why female ſucceſſion prevailed.

The later Scottiſh ſtatutes mention *our ancient enemies the Engliſh.* Hence ſuperficial and prejudiced writers have conſidered the enmity of the two nations as in a manner coeval with their exiſtence; and have argued, conſiſtently enough upon ſuch erroneous principles, that Scotland could never have borrowed laws from her ancient enemy (*i*).

This error, occaſioned by confounding different æras in the hiſtory of the iſland, has been ſtrengthened by an obvious obſervation, That at the union of the crowns the laws of Scotland and England differed in many particulars (*k*).

Had it been remembered, that the Engliſh, for reaſons of expediency, gradually departed from the Norman inſtitutions, while the leſs-diſcerning Scots were fatally buſied in rivetting the chains of ariſtocracy; a modern diſſimilarity, and an ancient ſameneſs, in the laws of the two nations, would have been found conſiſtent and explicable.

In the courſe of this inquiry, the claimant has ſuppoſed, that before the age of Malcolm Kanmore, there were laws in Scotland re-

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*b*) The diſtreſs of which this *finance*, as it is called, was productive, may be ſeen in the *Black Acts*, parl. 1. James I.

(*i*) *Bruce*, Principia juris Feudalis, *ſcopuſ.* 7. "Nam quid (malum) nobis cum anti-" quis inviſiſque hoſtibus? Quove colore dici poterit, ex illorum ſinu leges aut conſuetudi-" nes noſtras ullo tempore fuiſſe depromptas, cum quibus nullam unquam morum ſimili-" tudinem, nullam humani, perexiguam divini juris communionem, nullum, præter bel-" lum, aut infidam pacem, negotium, nihil denique commune habuiſſe Scotos apud cun-" ctos alios utriuſque gentis, exteroſque etiam, ſcriptores, plane in confeſſo eſt?" Any one acquainted with the hiſtory of the two nations, will ſmile at this burſt of paſſion. Bruce had forgot, that the queſtion in the great diſputed ſucceſſion was, *Which* of two Anglo-Norman Lords ought to ſucceed to the Earl of Huntingtoun?

(*k*) This argument is exultingly uſed by *Bruce*, Principia juris Feudalis, Prolegomena, p. 7.

Why female ſucceſſion prevailed.

gularly digeſted, and properly executed; and that by thoſe laws, the mode of ſucceſſion was different from what it afterwards became. This is giving much more than is probable, and is only ſuppoſed in order to illuſtrate the argument.

While men remain in an uncivilized ſtate, there will be little regularity in the form of ſucceſſion. The ſtrongeſt will commonly prevail. If thoſe of the family of the deceaſed are nearly equal in ſtrength, the inheritance will be divided. Thus anciently in Ireland, "the inheritance of the deceaſed was equally divided among "the ſons, both lawfully and unlawfully begotten (*l*)." Some traces may be diſcovered in the hiſtory of Scotland of the uncle being preferred to the infant nephew. This is explicable upon the ſame principles; but it is unneceſſary to enter into ſuch diſquiſitions. Whatever may have been the caſe in ages of barbariſm, it is certain, that female ſucceſſion may be found in Scotland where-ever records and hiſtory reach.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*l*) Sir James Ware, *Antiquities of Ireland*, in princ.

CHAP.

CHAP. II.

In early times Juriſdictions have deſcended to Females.

THE proof of this propoſition is full and convincing. If any office with juriſdiction could be ſaid to be peculiar to a male, it was that of *Conſtable*. The extenſive powers and authority of that great officer, in war as well as in peace, are well known (*a*); and yet, to the confuſion of theories, it has happened, that the office of Conſtable in Scotland has frequently deſcended to females.

1189, Richard de Moreville, Conſtable of Scotland, died (*b*).

He left iſſue, William de Moreville, and a daughter, Eva, [rather Ela, or Helena], married to Rolland Lord of Galloway (*c*).

1196, William de Moreville died, and was ſucceeded by his ſiſter, Ela. Her huſband Rolland officiated as Conſtable. They were ſucceeded by their ſon Allan (*d*).

1234, Allan Lord of Galloway, Conſtable of Scotland, died; leaving iſſue three daughters, co-parceners; 1. *Helen*, the wife of Roger de Quinci, Earl of Wincheſter; 2. *Dervogild*, the wife of John Baliol, Lord of Bernard-Caſtle; 3. *Chriſtina*, the wife of William de Fortibus, ſon of the Earl of Albemarle.

The natives of Galloway, inclining to have one, inſtead of three ſeveral Lords, requeſted Alexander II. to aſſume the lordſhip to himſelf, in prejudice of the co-heireſſes: but that juſt monarch [*pius Rex*] rejected their requeſt. On this the natives, headed by

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*a*) See *Spelman*, Gloſſ. *voc.* Conſtabularius.

(*b*) *Chron. Melros*, apud Gale, p. 178.

(*c*) *Sir James Dalrymple*, Hiſtorical Collections, p. 348. *Chron. Melros*, p. 194.

(*d*) *Ditto*, ibid. & p. 201. *Crawfurd*, Officers of State, Appendix, N° 25. where "Rollandus filius Uchtredi Conſtabularius" is a witneſs to a charter before 1214. *Char. Melros*, fol. 56. where mention is made of "Alanus, filius Rollandi, Conſtabularius Regis Scotorum."

a baſtard ſon of Allan's, roſe in rebellion, and waſted the neighbouring country. The King led an army againſt them, ſubdued them, and left the eſtate to be divided equally among the three daughters (*e*).

Roger de Quinci, the huſband of the eldeſt daughter of Allan of Galloway, was Conſtable of Scotland. He died in 1264, leaving three daughters, co-parceners; 1. Margaret, the wife of William de Ferreriis, Earl of Derby; 2. Eliſabeth, the wife of Alexander Cumin, Earl of Buchan; 3. Ela, or Helen, the wife of Allan la Zouche (*f*).

William

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*e*) The narrative here given is taken from *Chron. Melros*, p. 201. "Anno 1234, obiit Alanus, filius Rolandi, Dominus Galwethiæ, et Conſtabularius Scotiæ; et reliquit tres "filias hæredes, et filium unum baſtardum; qui, dum adviveret pater ejus, duxit uxorem "filiam Regis de Man. Filiæ autem ejus nupſerunt his viris: Prima, ſcilicet, Rogero de "Quincy, Comiti Wintoniæ; ſecunda, Johanni de Balliol; tertia, filio Comitis de Albermarle; inter quas diviſa terra prædicti Alani. Sed indigenæ illius terræ malentes habere unum Dominum quam plures, ad Dominum Regem acceſſerunt, poſtulantes, quatenus hæredibus [ex-] hæredatis, ſuper ſe dominium acciperet. Quod *pius Rex* minimè curavit. Quapropter Galwethienſes, ſupra modum intumeſcentes, ſeſe ad reſiſtendum præparaverunt, necnon et quaſdam terras Domini Regis viciniores ferro flammâque vaſtaverunt."—p. 203. "Sedatâ tandem Galweiâ, hæredes terras acceperunt, quas inter ſe æquâ lance diviſerunt."

A. Winton, MS. Chronicle, Advocates Library at Edinburgh, thus ſpeaks.

"The Gallowayis the nixt yeir
"Agane the King maid thame to ſteir,
"For cauſe thai wald that Thomas
"That Alane of Gallowayis *ſone* was,
"Had bene thair Lord into that ſteid
"Eftir his fader that than was deid.
"Thai fayndit of this the Kingis will,
"But he wald nocht conſent thairtill;
"Bot that he denyit with reſſoun,
"*For it had bene diſheriſoun*
"*Till* Alane of Gallowayis *douchteris thrê*
"*That his airis of lauch ſuld be.*"

Winton calls Thomas the *ſon* of Alan of Galloway: the context ſhews, that by *ſon*, he meant *illegitimate ſon*.

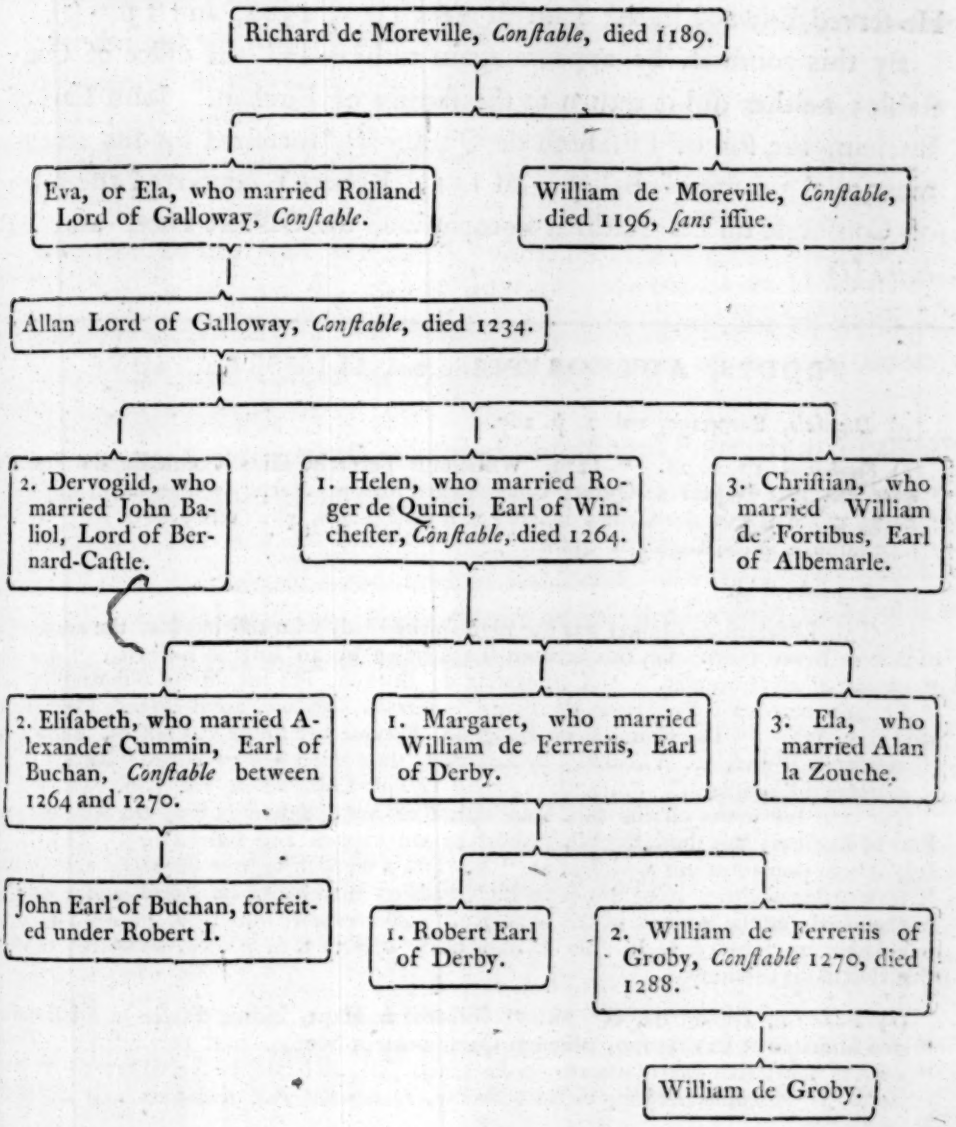
See alſo *Matthew Paris*, p. 294. edit. 1644; and *Dugdale*, Baronage, vol. 2. p. 688. *Fordun*, l. 9. c. 48. ſpeaks much to the ſame purpoſe: he agrees with Winton, that the natives of Galloway wiſhed to have the baſtard for their Lord. "Quia a Domino Rege "impetrare nequiverant, quod Thomas, filius naturalis dicti Alani, *exhæredatis tribus* "*filiabus ſuis, hæredibus legitimis*, fieret hæres, et eorum Dominus."

(*f*) *Dugdale*, ibid. *Fordun*, l. 10. c. 18.—1264. "Obiit Rogerus de Quinci, Comes "Winceſtriæ,

William de Ferreriis, Earl of Derby, the huſband of the eldeſt daughter of Roger de Quinci, had by her two ſons; 1. Robert, Earl of Derby; and, 2. William. William, by the gift of his mother,

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

" Winceſtriæ, Conſtabularius Scotiæ; cujus terræ tribus filiabus poſtea æquâ lance diviſæ " ſunt." This female deſcent of Conſtables being ſomewhat intricate, is explained in the pedigree annexed.



had the manor of Groby in Leiceſterſhire, which came to her upon the partition of the Engliſh inheritance (*g*); it may be preſumed, that ſhe alſo beſtowed her Scottiſh inheritance upon him; for that in 1270, he obtained poſſeſſion of the dignity of Conſtable, which Alexander Earl of Buchan, huſband of the ſecond daughter of Roger de Quinci, unjuſtly held (*h*).

He died in 1288. In 1296, his ſon William had livery from Edward I. of all the lands which he held of the King within Scotland. He ſerved Edward in the Scottiſh wars 1301, 1303, and 1306 (*i*).

By this conduct, he appears again to have loſt the office of Conſtable; neither did it return to the family of Buchan. John Earl of Buchan, the ſon of Eliſabeth de Quinci (*k*), forfeited for his attachment to the cauſe of Baliol. In 1315, Robert I. conferred the office of Conſtable on his faithful companion, Sir Gilbert Hay, and *his heirs* (*l*).

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*g*) *Dugdale*, Baronage, vol. 2. p. 267.

(*h*) *Fordun*, l. 10. c. 28. "1270, Willielmus Ferreris, filius Comitiſſæ de Ferreris, "quæ fuit filia Rogeri de Quinci Conſtabularii Scotiæ, accepit — dignitatem Conſtabu- "lariæ, quam Alexander Comes de Buchan injuſtè tenuit, *prætextu uxoris ſuæ*, ſcilicet, "filiæ junioris ipſius Rogeri de Quinci."

(*i*) *Dugdale*, ibid.

(*k*) This Eliſabeth de Quinci was the high-ſpirited lady who officiated at the coronation of Robert Bruce 1306. On this account ſhe is called by an Engliſh hiſtorian "*the moſt* "*impious of all traitreſſes.*" "Conjuratrix de Buchan, illa impiiſſima conjuratrix quæ "ſecundo coronavit Robertum de Bruce." *Gervas. Monach.* apud *Leland*, Collectanea, vol. 1. p. 271. "The Counteſs of Boughan, bycauſe her ſunne was abſent, lying at his "manor of Witnik [r. Whitwick] by Leiceſtre, toke upon her to corone Robert Bruſe "at Scone in Scotland." *Scalæ Chron.* apud *Leland*, Collectanea, vol. 1. p. 542.

Our later hiſtorians aſcribe this bold action to her daughter-in-law, the wife of John Earl of Buchan; but thoſe Engliſh authorities are expreſs and ſatisfactory. This is the lady whom our hiſtorians repreſent as "put into a wooden cage at Berwick, and, in that "tormenting poſture, hung out from high walls or turrets, to be gazed upon, and re- "proached, by the meaneſt of the populace." *Abercrombie*, vol. 1. p. 579.—The original order by Edward I. for her confinement, *Rymer*, t. 2. p. 214. abſolutely confutes this ridiculous calumny.

(*l*) *Anderſon*, Diplomata, N° 46. "Gilberto de Haya, Militi, dilecto et fideli noſtro, "pro homagio et ſervitio ſuo, officium Conſtabulariæ Scotiæ, cum pertinentiis: Tenen- "dum et habendum dicto Gilberto, et *hæredibus ſuis*, in feodo et hæreditate;—faciendo "nobis, et hæredibus noſtris, dictus *Gilbertus, et hæredes ſui, ſervitium inde debitum et* "*conſuetum.*"

As

As in Scotland, ſo alſo in England, the office of Conſtable deſcended to females. After the death of Milo Earl of Hereford and his ſons, his daughter Marjory, the wife of Humphry de Bohun, ſucceeded both to the earldom, and to the office of Conſtable. Both remained in the Bohun family for many generations. At length, the male line failed in Humphry de Bohun. His eldeſt daughter and heir, Eleonora, brought the earldom and the office of Conſtable to her huſband, Thomas of Woodſtock, the ſixth ſon of Edward III. (*m*).

This ſingle example of the conſtabulary might ſuffice for proving the deſcent of juriſdictions to heirs-general by the ancient law and cuſtom of Scotland.

It may however be added, that examples are to be found of women directly named and ſubſtituted in the grant of an office.

Thus the office of Mair of Fee of Aberdeenſhire was granted to George Biſſet, and Margaret Leſlie, *his wife, and the longeſt liver of them, in conjunct fee*, and to the heirs procreated or to be procreated between them. This charter proceeds upon the reſignation of Margaret and Eliſabeth, *daughters and heirs* of Patrick Leſlie of Petmuſktoun (*n*).

Robert II. granted the offices of Sheriff and Forreſter of Clackmannan to William Menteith, ſon and heir of Marjory Sterling, the *daughter and heir* of John de Sterling, Miles, and to *Eliſabeth, his wife*, to the longeſt liver, and to the heirs between them; reſerving to the ſaid Marjory the franc tenement of the foreſaid lands and offices for all the days of her life (*o*).

Robert

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*m*) *Spelman*, Gloſſ. *voc.* Conſtabularius. "Defunctis omnibus ſine prole, Hereford-
" diæ comitatus, et Conſtabularia Angliæ, nuptiis Margeriæ ſororis eorum, ad Humfredum
" de Bohun devoluta ſunt. Numerantur ex ea familia decem *Conſtabularii*, Humfredi omnes
" dicti, præter Johannem unum, ſub exitu Edwardi II. et Gulielmum, patrem Humfredi
" noviſſimi; qui ſine prole maſcula decedens, Elianoram filiam primogenitam hæredem re-
" liquit tantarum dignitatum. Ipſa Thomæ de Woodeſtock, ſexto filio Edwardi III. in
" matrimonio collocata, maritum ſalutavit Angliæ *Conſtabularium*."

(*n*) *Records*, b. 20. N° 72. 16th July 1521.

(*o*) Royal Charter, in the claimant's poſſeſſion. "—— Willielmo de Menteith, filio et hæ-
" redi

Robert II. upon the reſignation of William de Keith, and Margaret his wife, granted to their ſon John, " omnes et ſingulas terras, " poſſeſſiones, redditus, et *officia*, cum pertinen. quæ fuerunt Willi- " elmi de Keith, Militis, Mareſcalli noſtri Scotiæ, et Margaretæ " Fraſer, ſponſæ ſuæ, *ratione dictæ ſponſæ*, ubicunque infra regnum " noſtrum (*p*)."

Neither is there any thing anomalous in this: for during the nonage of the female heir, the Sovereign held poſſeſſion by right of ward; and as ſoon as ſhe was marriageable, the Sovereign provided a huſband for her. If, after majority, ſhe continued unmarried, which was a rare caſe, or if ſhe became a widow, ſhe could appoint a deputy to officiate in her ſtead; and thus the juriſdiction might at all times, and in every event, be properly adminiſtered (*q*).

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

" redi Mariotæ de Stirling, filiæ et hæredis quondam Joannis de Stirling, Militis, et E- " liſabeth ſuæ ſponſæ, et eorum diutius viventi, et hæredibus inter ipſos; ſalvo dictæ Ma- " riotæ libero tenemento omnium præfatarum terrarum, tenementorum, et *officiorum*, " pro toto tempore vitæ ſuæ."

(*p*) *Roll* 2. N° 48. 7th January 1374-5.

(*q*) This is no theory, and it is eſtabliſhed by a moſt reſpectable authority, by no leſs than the opinion of the judges of England, 6 Henry VIII. " Poſſe fœmellas, dum ſint innubæ, " procuratorem conſtituere, qui earum nomine ſervitium peragat: poſt nuptias autem, ma- " ritum primogenitæ ſolum hoc facturum." *Spelman*, Gloſſ. *voc.* Conſtabularius.

CHAP.

CHAP. III.

A grant of an eſtate *hæredibus ſuis*, meant *to heirs-general.*

BY the words of limitation of an eſtate in an ancient charter, to the grantee, ET HÆREDIBUS DE CORPORE SUO LEGITIME PROCREATIS VEL PROCREANDIS, or to the grantee, ET HÆREDIBUS SUIS, were underſtood HEIRS-GENERAL, and not HEIRS-MALE.

This is rather a corollary to the former propoſitions already proved, than a ſeparate propoſition ſtill requiring proof.

When it appears, that by the common law and uſage of Scotland, females were *heirs* in their order of ſucceſſion, it can never be imagined, that a term deſcriptive of *all heirs* was meant to exclude *one ſpecies of heirs.*

The meaning of theſe words at preſent cannot be doubted, and there is as little reaſon to doubt, that, in former times, they were conſtrued in the extent that their natural ſenſe imports.

That nothing, however, may be omitted, the claimant will ſhew, by a ſeries of examples, from the reign of Alexander II. to the reign of James I. that females took by a limitation *hæredibus ſuis*, in excluſion of the remoter heir-male; and that when the intention was to limit the ſucceſſion to males, in excluſion of females, it was done by very expreſs words.

The conſequence of this is, that the difference between *hæredes ſui* and *hæredes maſculi* was perfectly underſtood in Scotland for many ages paſt, and was in thoſe remote times preciſely the ſame as at this day.

The claimant begins with an example in the reign of Alexander II. who ſucceeded his father, William the Lion, in 1214.

I. William the Lion made a grant of the lands of Pannomor and Banevin [Panmure and Benvine] to Philippus de Valloniis, and con- Alexander II.

firmed it to his ſon Willielmus de Valloniis. " Tenend. ſibi et hære-
" dibus ſuis (*a*)."

Willielmus de Valloniis died in 1219 (*b*), without male iſſue; and conſequently " the lands in the grant returned to the crown in vir-
" tue of the limitation *hæredibus ſuis*, or to *heirs-male*; there was no
" *quibuſcunque* to convey the lands to *heirs-general*." So Sir Robert Gordon would plead.

It happened, however, that Willielmus de Valloniis left a daughter, Chriſtian, married to Sir Peter de Maule, and *ſhe* took the eſtate, which ſtood deviſed *hæredibus ſuis* (*c*), Sir Robert's plea to the contrary notwithſtanding.

Sir Robert Gordon will ſcarcely object, that *this* example of the meaning of *hæredibus ſuis* is too modern; for it is *five hundred and fifty years old*.

Robert I. II. Robert I. after his acceſſion to the crown, beſtowed his earldom of Carrick on his brother Edward Bruce.

The grant runs thus: " Tenend. Edwardo Bruce, et hæredibus maſ-
" culis de corpore ſuo, et hæredum ſuorum exeuntibus, et tantum-
" modo per lineam rectam et maſculinam continuo deſcendentibus:
" niſi in caſu quo fuerint plures fratres germani ſuperſtites; in quo
" caſu, decedente primogenito ſine hæredibus maſculis de corpore
" ſuo procreatis, ſecundo genitus in dictum comitatum hæreditariè
" eidem ſuccedat; et ſic de aliis hæredibus (*d*)."

It is remarkable how many words are employed in this charter, to deſcribe what in a more verboſe age, would have been deſcribed

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*a*) Publiſhed, from the archives of the family of Panmure, by *Crawfurd*, Appendix to Lives of Officers of State, N° 25.

(*b*) *Chron. Melros*, apud Gale, p. 197.

(*c*) See the evidence of this in *Crawfurd*, Officers of State, p. 259, and Appendix, N° 26. 27, in which laſt writing ſhe is ſtyled, " Chriſtiana de Valoins, Domina de Pan-
" mor."

(*d*) *Charter* Record, Roll 1. N° 45.

by

by the words, *heirs-male of his body*. The reaſon of this anxiety is obvious: limitations to males in the male line being at that time uncommon, the conveyancers were puzzled how to expreſs them; and as the words *hæredum ſuorum* had been employed, the writer of the charter feared that they might be ſo conſtrued, as to give an eſtate in fee to a male heir of the body of the firſt grantee, although deſcended from a female; and to guard againſt this, he has added a very ſpecial and minute deſcription of a continued male ſucceſſion.

III. The propoſition, That *hæredes de corpore* meant heirs-general, is clearly eſtabliſhed from the entail of the kingdom of Scotland made in parliament at Air in 1315 (*e*). Robert I.

The whole clergy and laity became bound to yield their allegiance to Robert King of Scots, and the heirs-male lawfully to be procreated of his body.

In the event of his death without iſſue-male, the crown was ſettled on his brother Edward, and the heirs-male lawfully to be procreated of his body.

Then follows this clauſe: "Item ordinaverunt, quod, deficientibus "dicto D. Eadwardo, et hæredibus ſuis maſculis de corpore ſuo le-"gitimè deſcendentibus, prædicti regni Scotiæ ſucceſſio ad prædic-"tam Marjoriam [the King's daughter], vel, ipſâ deficiente, ad *pro-"pinquiorem hæredem de corpore Domini Regis* Roberti *linealiter deſcen-"dentem*, ſine contradictione cujuſcunque, revertatur."

According to Sir Robert Gordon's interpretation of *propinquior hæres de corpore*, the entail 1315 will ſtand limited thus: "To the "King's iſſue-male;—to his brother Edward, and his iſſue-male; "—to his daughter Marjory;—whom failing, to the King's iſſue-"male." Than which a more palpable contradiction and abſurdity cannot be figured.

IV. Andreas de Leſcelyn, Dominus ejuſdem, granted the lands of Robert I.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*e*) *Fordun*, l. 12. c. 24.

Monorgund,

Monorgund, "Johanni filio meo in feodo et hæreditate, *ſibi et hæredibus* " *ſuis*. Volo etiam et concedo, quod ſi contingat dictum Johannem " *abſque prole* de corpore ſuo legitimè procreat. in fata decedere, " quod abſit, quod dicta terra liberè revertatur ad me et *hæredes* " *meos* (*f*).

It is undeniable, that *abſque prole*, in the latter part of the clauſe, is oppoſed to *hæredes ſui* in the former; and therefore Sir Robert Gordon muſt either admit, that *hæredes ſui* implies *heirs-general*, or contend, THAT A MAN'S DAUGHTER IS NOT HIS PROGENY.

Edward Baliol. V. In 1335, Edward Baliol, calling himſelf *King of Scots*, made a grant of certain lands to John of the Iſles: " Tenend. eidem Johan- " ni, hæredibus et aſſignatis ſuis," for good ſervices performed, and to be performed, " per ſe et hæredes ſuos (*g*)."

Whether this grant be to *heirs-general and aſſigns*, or to *heirs-male and aſſigns*, is left to the judgement of every impartial perſon.

David II. VI. David II. granted the earldom of Roſs to William Earl of Roſs, " et hæredibus ſuis maſculis de corpore ſuo; quibus deficientibus, " Waltero de Leſley, Militi, et Euphemiæ [the grantee's daughter] " ſponſæ ſuæ, et eorum diutius viventi, et hæredibus de ipſa Eu- " phemia legitimè procreatis ſeu procreandis: ita, viz. ut ſi hæres " maſculus de ipſa Euphemia non exierit, et plures de ſe habuerit " filias, ſenior ſemper filia, tam ipſius Euphemiæ quam *ſuorum hæ-* " *redum* de ſe exeuntium, deficientibus hæredibus maſculis, habeant " totum jus ad integrum dictum comitatum, ſine diviſione aliqua- " li (*h*).

From this inſtrument it is manifeſt, that when a grant was meant to be limited to *heirs-male*, *heirs-male* were therein ſpecially expreſſ-

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*f*) Original charter produced.

(*g*) *Rymer*, t. 4. p. 711.

(*h*) *Record* Charters, b. 1. N° 258.

ed:

ed: it is alſo manifeſt, that a grant *hæredibus* included *heirs-female*; for here the grant is made "Euphemiæ, et *hæredibus* de ipſa legi- "timè procreatis ſeu procreandis;" and there is an expreſs proviſo, that in caſe the earldom thereby devolved on *heirs-female*, the eldeſt ſhould ſucceed to the whole, without diviſion.

The grant "*Euphemiæ hæredibus*" being interpreted *hæredibus maſculis*, becomes abſolute nonſenſe. Suppoſing the earldom to be limited to the heirs-male of her body, how could there be any danger of the earldom being divided among the heirs-female of her body?

It is therein further provided, That the eldeſt daughter of Euphemia ſhould ſucceed, and that the eldeſt daughter *ſuorum hæredum* ſhould alſo ſucceed: how then can it be queſtioned, that in the reign of David II. *hæredes ſui* meant *heirs-general?* If *filia ex filia* be not an *heir-general*, there is no ſuch thing in the law of Scotland. It is impoſſible that any commentary can make the import of this grant more clear and explicit.

VII. There is a grant by David II. to his faithful adherent Sir Malcolm Fleming, limited "hæredibus ſuis legitimè procreatis ſeu "procreandis, *per lineam maſculinam deſcendentibus* (*i*)." David II.

If, as Sir Robert Gordon inſinuates, *hæredes ſui*, and *hæredes maſculi*, were ſynonymous, the expreſſion, "*per lineam maſculinam deſcen-* "*dentibus*," would be abſurd, and intolerable tautology.

VIII. In the reign of David II. William Earl of Sutherland granted the lands of Thorball to his brother Nicholas: "Tenend. et ha- "bend. prædict. Nicholao, et *hæredibus ſuis de corpore ſuo legitimè* "*procreatis et procreand. de nobis, et hæredibus noſtris* (*k*)." David II.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*i*) Printed in Crawfurd's Peerage, p. 464.

(*k*) Original Charter in the poſſeſſion of the claimant, and charter by King David II. confirming it.

The claimant and Sir Robert Gordon muſt differ as to the interpretation of this grant. She aſſerts, that it is to be held "of the "heirs-general of the granter, to the heirs of the body of the firſt "grantee, female as well as male." Sir Robert muſt aſſert, that it is limited "to the heirs-male of the body of the firſt grantee, to be "held of the heirs-male of the granter."

Which of the two interpretations is juſt, will beſt appear ffom the next inſtrument to be produced.

Nicholas reſigned the lands "a ſe, et hæredibus ſuis," in the hands of Robert Earl of Sutherland for new infeoffment to Henry Sutherland, the ſon of Nicholas: "Tenend. ſibi, et *hæredibus ſuis maſculis de* "*corpore ſuo legitimè procreandis*, a prædicto Comite de Sutherland, "et *hæredibus ſuis* (*l*)."

Alexander Sutherland, the ſon of this Henry, obtained a renewal of the inveſtiture from John Earl of Sutherland: "Tenend. a nobis, "et *hæredibus noſtris*, prædicto Alexandro Sutherland, Domino de "Thurball, et *hæredibus maſculis de ſuo corpore* legitimè procreatis "ſeu procreandis (*m*)."

Let it now be conſidered what is the ſenſe of Nicholas's ſurrender upon the hypotheſis of Sir Robert Gordon.

Holding the lands deviſed to him, and the heirs-male of his body, [ſo Sir Robert interprets, *hæredibus ſuis de corpore*], he reſigns them for new infeoffment to him, and the heirs-male of his body; that is, he gives up his lands, to take them back again, by the circuit of a feudal conveyance, juſt as he held them already, without increaſe or diminution of right.

Between landholder and tenant this would be abſurd: A tenant holds a leaſe, he renounces it in order to obtain another leaſe ſimilar to the former in every the moſt minute particular.

But upon the claimant's hypotheſis, the purpoſe of the reſignation is clear. The Earl of Sutherland had made ſome treaty with Ni-

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*l*) *Original* Inſtrument, in the poſſeſſion of the claimant.

(*m*) Ditto.

cholas

cholas for a limitation of his original right; and this could not be rendered effectual, unleſs by the vaſſal reſigning the old, and the ſuperior granting a new charter.

The glaring improbability of *hæredes ſui* and *hæredes maſculi* being diſtinguiſhed in words, if the ſame in ſenſe, is obvious in this, as well as in many other of the examples produced for the claimant.

IX. Robert II. gave his daughter Ægidia in marriage to Sir William Douglas, a natural ſon of Archibald Lord of Galloway; with her he ſettled the lordſhip of Niddeſdale, " *ſibi, et hæredibus inter ſe* " *procreandis.*" Robert II.

Of this marriage there was iſſue only one child, a daughter. She married Henry St Clair, Earl of Orkney; and had iſſue, William Earl of Orkney (*n*).

According to Sir Robert Gordon, this Counteſs of Orkney and her ſon had no right to the lordſhip of Niddeſdale; for that it ſtood limited *hæredibus inter ſe procreandis*; that is, to *heirs-male*.

Nevertheleſs, *according to record*, the right of the heireſs and of her ſon was good, and was acknowledged to be good by James II. He granted the earldom of Caithneſs to William Earl of Orkney, " et hæredibus ſuis;" and declared this grant to be in compenſation of a claim of right which the Earl of Orkney and his heirs had to the lordſhip of Niddeſdale, by the marriage-contract of Ægidia, his grandmother, daughter of Robert II. (*o*).

X. Iſabella Comitiſſa de Marr et Domina de Garrioch granted a charter of the lordſhip of Glendowachy to Alexander de Keth: " Tenend. et habend. prædicto Alexandro, et *hæredibus ſuis de corpore* Robert III.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*n*) *Fordun*, l. 14. c. 52. " Dominus Rex [Robert II.] ſibi tradidit in matrimonium " Dominam Ægidiam, filiam ſuam, et cum eadem, *ſibi, et hæredibus inter ſe procreandis*, " dominium de Nyddeſdale, perpetuè poſſidendum. — De qua genuit unicam filiam, quæ " nunc ſupereſt, olim Domino Henrico ſecundo de Sancto Claro, Comiti Orchadiæ, de- " ſponſatam; de qua ipſe genuit Willielmum, Comitem ejuſdem, adhuc ſuperſtitem."

(*o*) *Original charter*, 28th Auguſt 1455, and precept for infeoffment thereupon.

" *ſuo*

" *ſuo* procreatis ſeu procreandis, de nobis, et *hæredibus noſtris maſculis* " de corpore noſtro legitimè procreandis," &c. (*p*).

If *hæredes ſui* in the one line, and *hæredes maſculi* in the next, were ſynonymous, it is left with Sir Robert Gordon to account for the obvious and purpoſed variation in the phraſe.

James I. XI. Robert Duke of Albany, and Earl of Buchan, granted the *comitatus* of Buchan to his ſon John Lord of Onell and Coull. The limitation is *hæredibus maſculis* of John, and of his younger brothers. There is a clauſe of return to the *hæredes legitimi* of the granter (*q*).

If *hæredes maſculi* and *hæredes legitimi* were ſynonymous, whence aroſe this variation in the phraſe?

OBJECTION.

p. 2. 3. " By the term *hæredes ſui*, or *hæredes inter ipſos*, in limitations, ei-
" ther of lands, or peerages, were underſtood only the ancient heirs,
" viz. *heirs-male*. It required the introduction of the words *hæredes*
" *quoſcunque*, in the thirteenth or fourteenth century (*r*), to make
" room for the admiſſion of females into either; but after ſuch admiſ-
" ſion, the word *quoſcunque*, which was once neceſſary, was dropt as
" no longer ſo, and *hæredes ſui* now means *heirs* of both kinds, unleſs
" the deed is relative to ſome former; in which caſe, the meaning of
" thoſe words is ſtill governed by the inveſtiture to which they relate."
In proof of this, the following paſſage of Craig, lib. 2. dieg. 14. § 2. 3. is quoted (*s*). " Itaque ex jure Feudali, *hæredum generalium* nomine,
" mares tantum comprehenduntur: adeo ut ſi Titius *Mevio, et ejus*
" *hæredibus*, feudum conceſſerit, hæredes maſculi tantum ſuccederent,
" et non fœminæ, etiamſi arma tractare didicerint; ut antiquitùs Ama-
" zones ſolebant, ut de Joanna Puella Aurelianenſi, et quadam hodie

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*p*) Charter, 3d November 1402, confirmed by Robert III.

(*q*) 20th September 1406, Roll, Duke of Albany, elſewhere quoted at large.

(*r*) By *thirteenth or fourteenth century*, the claimant underſtands, that Sir Robert Gordon means the period from 1200 to 1400. This is the proper ſenſe of the words: although Sir Robert Gordon ſhould underſtand them in a vulgar and unlearned ſenſe, it will not vary the claimant's argument.

(*s*) A paſſage from Lord Stair, b. 3. tit. 4. § 20. is alſo quoted; but as it ſeems to be a tranſcript from Craig, there is no occaſion for repeating it here.

" Hibernica,

" Hibernica, narratur. Ratio eſt, quia ad ea quæ raro fiunt, voluntates " contrahentium non rectè accommodantur.— Quod de filiabus diximus, " idem de omnibus ex filia deſcendentibus, ſive mares ſint, ſive fœminæ; " nam ne mares quidem per fœmineam lineam deſcendentes ad ſucceſſio- " nem admittuntur. § 3. Hæc niſi aliter in inveſtitura proviſum fue- " rit, i. e. niſi tenor inveſtituræ, ſive ſolennis illa feudi conceſſio conti- " neat nominatim, ut hæredes, tam mares quam fœminæ, aut *hæredes* " *quicunque*, ſuccederent: neque tamen, ne hoc quidem caſu, fœminæ " ſuccedunt, niſi nullus ſuperſit maſculus. Quamdiu enim unus maſculus " filius extat, fœminas excludit, et hoc propter armorum paratiorem " expeditionem. *Proviſum in inveſtitura* dicimus, ſi ita concipiatur, " [*hæredibus ſuis quibuſcunque*]; nam vocem hanc, *hæredes quicun-* " *que*, fœminas etiam comprehendere, neceſſe eſt. Itaque talis clauſu- " la, quoties in inveſtitura expreſſa eſt, facit ut feudi ſucceſſio, non mi- " nus ad fœminas quam ad mares, fœminas, inquam, quæ gradu ſint pro- " piores, pertineat.—*AT NOSTRI MORES*, per generalem *hæ-* " *redum* mentionem, etiam fœminas ad ſucceſſionem, non extantibus " maribus, admitti putant. Hoc eo evenit ex adjectione vocis [*qui-* " *buſcunque*], quæ determinatio etiam indubiè fœminas comprehendit. " Itaque eſt pronomen quod differentiam inducit; quod in omnibus in- " veſtituris adeo frequens eſt, ut etiam, cum omiſſum eſt, pro expreſſo " habeatur."

ANSWER.

In the former part of this paſſage, Craig ſpeaks not of the law or uſages of Scotland, but of the Longobardic feuds: in the latter, he mentions *noſtri mo-* *res*; and it would ſeem that his meaning is, that the limitation *hæredibus qui-* *buſcunque* was ſo general in inveſtitures, that it was *underſtood* when not expreſſed; and therefore, that a limitation *hæredibus ſuis* implied *hæredibus qui-* *buſcunque*, or to *heirs-general*.

It has been already proved, " That, as far back as hiſtory and records reach, " the ſucceſſion of females is found eſtabliſhed in Scotland, and that the limita- " tion *hæredibus ſuis* was known and uſed; that its conſequence was to let in " females; that the diſtinction between *hæredes ſui* and *hæredes maſculi* was " perfectly underſtood; and that when the intention was to limit the ſucceſſion " to males, in excluſion of females, it was done by very expreſs words."

If, in the paſſage quoted, Craig has advanced any propoſition contrary to what the claimant has proved, the certain conſequence is, that Craig has erred (*t*).

Upon

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*t*) Sir Robert Gordon terms Craig *the beſt of our antiquaries*. The fame of the excellent Craig, ſo deſervedly acquired, is diminiſhed by injudicious elogiums They who affect to conſider him in the light of an antiquary would do well to point out any one regi-

Upon the ſuppoſition, that by *noſtri mores* Craig meant the practice of his own age (*u*), his propoſition is far from being indefenſible. By that time, the cuſtom of terminating limitations with the clauſe *hæredibus quibuſcunque* had become general; and it was natural for practitioners in that age, not deeply converſant in antiquity, to ſuppoſe, that *hæredibus quibuſcunque* was a ſort of eſſential in every grant or ſettlement, implied, although not expreſſed.

If Craig meant, that in ancient charters the clauſe, *hæredibus quibuſcunque*, did generally occur, and therefore that the clauſe, *hæredibus ſuis*, afterwards introduced, was underſtood to refer to the ancient ſtyle, he is undoubtedly miſtaken.

In the moſt ancient charters of Scotland now exiſting, the only limitation is, *hæredibus ſuis*, or *hæredibus de corpore*.

Sir Robert Gordon is called upon to produce any one charter with other limitations, prior to the reign of Robert I.

In that reign limitations to *heirs-male* were firſt introduced; and in the courſe of that century, the clauſe, *hæredibus quibuſcunque*, became not unuſual, as the laſt termination, where there occurred a ſubſtitution to heirs of proviſion, male or female.

The claimant does not believe that the expreſſion, *hæredibus quibuſcunque*, is ever to be found as the firſt limitation in any ancient charter; nor, indeed, that it is to be found at all in any charter prior to the reign of Robert II. or perhaps of David II.

Leſs could not be ſaid by the claimant, without injuring her own cauſe; from reſpect to the memory of the excellent Craig, *more* ſhall not be ſaid.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

fter of religious houſes, record, or even unprinted ſtatute, which Craig ever conſulted in compoſing his treatiſe *De feudis*. It ſeems, that without thoſe aids, one may become *the beſt of our antiquaries*, and, by the courteſy of Scotland, may rank with Selden and Dugdale. If ſuch, indeed, is the caſe, they who have revolved many a taſteleſs volume, and waſted their ſpirits in inquiries into the ancient ſtate of Scotland, may well lament their ungrateful and unrewarded labour; they will hardly acquire any part of that fame, which another, without toil, and without ever conſulting one MS. has acquired.

He, in particular, who believes that Scotland was originally peopled by the ſuperfluities of Ireland and Norway, and was afterwards civilized by the acceſſion of Anglo-Saxons and Anglo-Normans, will never obtain a vacant niche in the temple of antiquaries.

(*u*) He wrote about the beginning of the laſt century.

CHAP.

CHAP. IV.

Connection between Lands and Titles of Honour.

THat "the moſt ancient method of conferring honours in "Scotland was by erecting certain lands into an earldom, &c. "and by inveſting the grantee in the lands," is a propoſition which the claimant imagined to be incontrovertible. However, ſince *it* too is controverted, the claimant muſt prove it.

If, by reaſon of ſuch proofs, this caſe ſhould be extended beyond the ordinary limits, Sir Robert Gordon is to blame, not the claimant.

To mention all the examples of this kind, would be to tranſcribe the numerous grants of different *comitatus* appearing upon record, and the different inſtruments wherein the grantees are denominated *Earls*.

In the courſe of the claimant's argument, many of thoſe examples occur. She will therefore, under this head, ſatisfy herſelf with the mention of a few others; and, as much as is poſſible, will neither repeat, nor anticipate.

Patrick Earl of March reſigned the earldom of March in the hands of David II. The King granted a charter of this earldom to George Dunbar, his ſon: "Tenend. et habend. dicto Georgio, et hæredibus "ſuis, de nobis, &c. *in unum integrum et liberum comitatum, ac libe-* "*ram baroniam*, cum feodis, &c. ſicut dictus Patricius dictum comi- "tatum, cum pertinen. de nobis, ante reſignationem ſuam nobis "exinde factam, liberiùs, quietiùs, et juſtè, tenuit ſeu poſſedit (*a*)." March.

George Dunbar thereafter received from David II. the appellation of "Dilectus conſanguineus noſter Georgius *Comes Marchiæ* (*b*)."

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*a*) *Record* Charters, b. 1. N° 196. 25th July, an. reg. 39.

(*b*) *Record* Charters, b. 1. N° 244. "Carta Georgii *Comitis* Marchiæ," 8th Februa-ry, an. reg. 40mo.

Robert

Moray. Robert II. granted, "dilecto filio noſtro Johanni de Dunbar, et "Marjoriæ ſponſæ ſuæ, filiæ noſtræ cariſſimæ, *totum comitatum Mo-* "*raviæ*, cum pertinen. &c. Tenend. et habend. totum comitatum "prædictum, &c. præfatis Johanni et Marjoriæ, et eorum diutiùs "viventi, ac hæredibus inter ipſos legitimè procreatis ſeu procrean- "dis; quibus fortè deficientibus, Georgio de Dunbar, Comiti Mar- "chiæ, et hæredibus ſuis legitimis quibuſcunque, de nobis, &c. in "unum integrum et liberum comitatum, et in pura et libera rega- "litate, &c. Apud Sconam, in pleno parliamento tento ibidem, 9no "die menſis Martii, anno regni noſtri 2do (*c*)."

John Dunbar, after this grant, is always ſtyled *Earl of Moray* (*d*).

Caithneſs. Upon the reſignation of Walter Stewart, Earl of Caithneſs, James I. granted to Alan Stewart, the ſon of Walter, "totum et integrum "comitatum de Caithneſs, cum pertinen. &c. Tenend. et habend. "prædicto Alano, et hæredibus ſuis maſculis de corpore ſuo legiti- "mè procreatis ſeu procreandis; quibus fortè deficientibus, præ- "dicto Waltero, avunculo noſtro, et hæredibus ſuis quibuſcunque, "de nobis," &c. (*e*).

Alan Stewart bore the title of *Earl of Caithneſs*. He was ſlain in Lochaber by Donald Balloch in 1431 (*f*).

By his death, the earldom of Caithneſs devolved on Walter Stewart, his father; and ſoon after, by his forfeiture, returned to the crown.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*c*) *Record* Charters, b. 1. N° 309.

(*d*) *Rymer*, t. 7. p. 388. Fordun's Continuator, ſpeaking of the battle of Otterburn 1388, ſays, "Dominus Johannes de Dunbar, *Comes de Moravia*, propter ſubitationem bel- "li, oblitus eſt caſſidis ſuæ; ita ut capite quaſi nudo pugnavit in campo." Lib. 14. c. 53. Froiſſart, vol. 3. ch. 123. calls him *Meſſire Jehan Comte de Moray*.

(*e*) *Record* Charters, b. 3. N° 74.

(*f*) *Fordun*, lib. 16. c. 17. "Dovenaldus, *Balloch* nomine, filius patrui Alexandri de "Inſulis, terram de Galeis apud Lochaber petiit: ubi ante ſe invenit Alexandrum et *A-* "*lanum Stewart*, *Comites* de Mar et de *Cathenes*, cum valenti exercitu; quos inconſter- "natè, cum minore tamen potentia, aggrediens, *dictum Dominum Alanum*, *filium Domini* "*Walteri Comitis Athollæ*,—interfecit." Bower, the Continuator of Fordun, was at that time in an office of conſiderable truſt at the Scottiſh court. Ib. l. 16. c. 9.

George

George Crichton, Admiral of Scotland, having obtained a grant of the earldom of Caithneſs from James II. became Earl of Caithneſs (*g*). Upon his death, the earldom again returned to the crown.

James II. granted a charter of this earldom to his chancellor, William Earl of Orkney, "*et hæredibus ſuis*," in compenſation, as the charter bears, of a claim of right which he and his heirs had to the lordſhip of Niddeſdale (*h*).

After obtaining this charter of the earldom of Orkney, William was ſtyled, *Earl of Orkney and Caithneſs* (*i*).

He afterwards ſurrendered the earldom of Orkney to James III. upon obtaining a charter of the lands of Ravenſcraig and others. This was ratified in parliament (*k*).

Being thus diveſted of the earldom of Orkney, he laid aſide the title, and for the future was ſtyled *Earl of Caithneſs* alone (*l*).

Before Sir Robert Gordon can reconcile this example with his hypotheſis, he muſt *preſume* a ſpecial grant of the dignity of Earl of Orkney, and alſo a ſpecial ſurrender of that grant; and he muſt further *preſume*, that both the one and the other have periſhed, while a ſpecial grant of the earldom, and a ſpecial ſurrender of that grant, do both exiſt upon record.

Only by the aid of *ſuch preſumptions*, and by introducing univerſal ſcepticiſm in matters of fact and record, can he deviſe an anſwer to this, and to many more of the claimant's arguments.

Alexander, the ſon and heir of Eliſabeth Gordon, was thrice married. By his *firſt* wife he had no iſſue. By his *ſecond*, Giles Hay, daughter and heireſs of John Hay of Tullibody, he had a ſon, *Alexander Seton de Gordon*. By his *third*, Eliſabeth Crichton, daughter of William Lord Crichton, he had a ſon, *George*. Hardy.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*g*) *Record* Charters, b. 4. N° 290. 8th July 1452.

(*h*) *Original Charter*, 28th Auguſt 1455, and precept for infeoffment thereupon.

(*i*) *Rymer*, t. 11. p. 423.

(*k*) *Ratification* by James III. an. 1471. Authenticated copy produced.

(*l*) *Rymer*, t. 11. p. 774. 775. *Record* Charters, b. 7. N° 393. 7th December 1476.

In 1449, he obtained a royal charter of the *earldom* of Huntly: "Tenend. dicto Alexandro Comiti, et prolibus et hæredibus inter "ipsum Alexandrum, et Elisabeth sponsam suam, Comitissam de "Huntly, procreatis seu procreandis; quibus fortè deficientibus, "veris, legitimis, et propinquioribus hæredibus dicti Alexandri "quibuscunque (*m*)."

Upon the death of Alexander, 1st Earl of Huntly, George, the son of the third marriage, succeeded to the estate and dignity of Huntly (*n*); whereas Alexander, the eldest son, obtained no more than his mother's estate of Tullibothy (*o*).

The succession of the family has been continued down from George unto this day.

Ross. Queen Mary bestowed the earldom of Ross upon Henry Stewart, Lord Darnley, by a charter which contains a new erection of the earldom, without any mention of the title (*p*).

In ten days after, Henry Stewart, under the title of *Comes Rossiæ*, obtained a charter of other lands (*q*).

Under the same title of *Comes Rossiæ*, he obtained a charter of the dukedom of Albany (*r*).

Merton. James, 3d Earl of Morton, had no male issue; but he had three daughters; 1. Margaret, married to James Duke of Chattelherault; 2. Beatrix, to Robert Lord Maxwell; 3. Elisabeth, to James Douglas, second son of George Douglas, the brother of Archibald Earl of Angus.

Such being the circumstances of his family, he granted a charter

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*m*) *Record* Charters, b. 4. N° 106. 29th January 1449-50.

(*n*) *Record* Charters, b. 7. N° 280. *Georgio Comiti de Huntly*, 30th March 1473.

(*o*) *Record* Charters, b. 7. N° 185. *Alexandro Setun de Gordon*, baroniæ de Tullibothie, 20th June 1473. *Royal charter*, confirming three charters by *George Earl of Huntly*, *Lord Gordon and Badyenach*, to *Alexander Seton* his brother, b. 7. N° 256.

(*p*) *Record* Charters, b. 32. N° 431. 15th May 1565.

(*q*) *Record* Charters, b. 32. N° 500. 25th May 1565.

(*r*) *Record* Charters, b. 32. N° 458. 20th July 1565.

of

of the lands, earldom, and barony of Morton, and his whole other eſtate, in favour of James Douglas, and Eliſabeth his wife, the youngeſt daughter of the granter, and to the longeſt liver in conjunct fee, and to the heirs-male to be procreated between them; whom failing, to David Douglas, the brother of James, and the heirs-male of his body; whom failing, to George Douglas, the father of James, and the heirs-male of his body; whom failing, to Archibald Earl of Angus, and certain other heirs of entail.

Queen Mary confirmed this charter by two different charters. All were ratified in parliament 1567 (*s*).

The Duke of Chattelherault, Dame Margaret Douglas, his wife, and their eldeſt ſon, all concurred in ratifying the Earl of Morton's charter, by a deed under their hands and ſeals (*t*).

Upon the death of the Earl of Morton, James Douglas, who was neither his heir-male, nor his heir-general, ſucceeded to the eſtate and dignity of Morton. He is well known in hiſtory by the name of *Regent Morton.*

There is neither evidence, nor even probability, of a creation in favour of James Douglas; and therefore it may be concluded, that the charter of the earldom, the royal confirmations, and ratification in parliament, were the only inſtruments which authoriſed him to aſſume that dignity.

Thus the claimant has mentioned ſome examples for proving, in general, that the grant of the dignified fee conferred the dignity; and, in particular, that the grant of the *comitatus* conferred the title of *Comes.*

She will now produce another ſeries of examples, wherein the ſame propoſition appears to be implied.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*s*) Original charter. Two royal charters, 22d April 1543, and 2d June 1564, and ratification in parliament 1567, all produced by the claimant.

(*t*) Original deed of ratification 1560, produced by the claimant.

Randulph Earl of Moray.

I. In 1312, Robert I. granted the following charter to his nephew, Sir Thomas Randulph: " Robertus, &c. Sciatis nos dediſſe, &c. " *Thomæ Randulph, Militi,* dilecto nepoti noſtro, pro homagio et ſer- " vitio ſuo, *omnes terras noſtras* in Moravia, &c. infra metas et di- " viſas ſubſcriptas [*here the limits are deſcribed*]: Tenendas et haben- " das dicto Thomæ, et heredibus ſuis maſculis de corpore ſuo le- " gitimè procreatis ſeu procreandis, de nobis, et hæredibus no- " ſtris, in feodo et hæreditate, in libero *comitatu,* ac in libera re- " galitate, &c. Quare vicecomiti noſtro de Inverneſs, &c. firmiter " præcipimus et mandamus, quatenus præfato *Comiti,* et hæredibus " ſuis prædictis, ac ſuis miniſtris, ſint auxiliantes, &c. In cujus rei " teſtimonium," &c. (*a*).

This charter is the baſis of the eſſay on *Honour, Dignity,* by Lord Kames: it will remain immoveable, notwithſtanding all efforts to ſhake it.

From the charter it appears, 1. That Thomas Randulph was not formerly an Earl; for in the beginning of the charter he is ſtyled *Miles,* without any addition.

2. That the lands were not formerly an earldom; for in the beginning of the charter they are called, *The King's lands* in Moray.

3. That, immediately after the clauſe of erection, the lands are called *comitatus,* and Thomas Randulph is called *Comes.*

OBJECTION I.

p. 24. Sir Robert Gordon ſays, " That the reaſoning is *childiſh.* Thomas " Randulph being ſtyled *Miles* in the beginning of the charter, is no " proof that he was not an Earl. *Miles* was then, and long after, a dig- " nity which even kings obtained, *vid. Robertſon's Hiſtory* of Charles V. " vol. 1. p. 70. There are many inſtances in the records of Scotland of " peers who had the title of *Miles* adjected to that of *Earl,* as in a char- " ter to David Earl of Strathern."

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*a*) *Chart. Morav.* fol. 91. p. 2. *Hadington's* Collections, MS. Advocates Library. *Lord Kames's* Eſſays on Britiſh antiquities, p. 101.

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ANSWER.

This reaſoning, now pronounced *childiſh* by Sir Robert Gordon, is what he himſelf repeatedly uſes. Thus, p. 32. the appellation "Walterus de Leſley, "*Miles*," is quoted to ſhew that he was a *commoner*; and, p. 36. it is ſaid, "James Stewart, brother to James II. was a *commoner* on the 1ſt March 1466. "*Evidence*, Charter, b. 7. N° 114. by James III. dilecto avunculo noſtro Jacobo "Stewart, *Militi*." There are other examples of the ſame mode of reaſoning to be found in the *Supplemental Caſe for Sir Robert Gordon*.

The claimant begs, that Sir Robert may either treat this reaſoning as *ſolid*, or as *childiſh*; and not both ways; *ſolid* when urged for him, *childiſh* when urged againſt him. This is an advantage in argument which no one can be permitted to aſſume.

There was no occaſion for quoting *Robertſon* to prove, "that *Miles* was a dig-"nity which even kings obtained;" but it is believed that Robertſon does not ſay, that an Earl, when he obtained the dignity of *Miles*, laid aſide his title of *Earl*.

The example of David Earl of Strathern, quoted by Sir Robert, proves the direct contrary. It ſhews, that the title of *Miles* was ſometimes added to that of *Comes*; not that the title of *Comes* was ever relinquiſhed.

Indeed Sir Robert does not appear to rely much on this objection; for, in the very next ſentence, he reſorts to an hypotheſis diametrically oppoſite.

OBJECTION II.

p. 24. "There is the ſtrongeſt reaſon to preſume, in this particular caſe of "the Earl of Moray, that in tranſcribing the charter into the chartulary, "the writer has inadvertently omitted Earl Randulph's deſignation, in "the firſt part of the charter. When he is firſt ſtyled *Comes*, it is by an "expreſſion which refers to a former part of the charter, where he had "been ſtyled Earl; for he is characteriſed by the words *dictus Comes*, "words plainly referring to the name *Earl*, which had formerly been gi-"ven him in the charter."

ANSWER.

If a *clauſe* neceſſary for an argument, may be ſupplied in any inſtrument from preſumption, there is provided a ſolution for all difficulties equally expedite and convenient.

The claimant ſays a *clauſe*; for *Thomæ Randulph Comiti*, *Militi*, would be a ſingular ſtyle. The words, then, which the tranſcriber inadvertently omitted, muſt have been *de Moravia Comiti*.

That he omitted thoſe words is altogether improbable. The argument for an omiſſion is of no force; for that as ſoon as the King granted to Sir Thomas Ran-

dulph certain lands, *tenend. in libero comitatu*, he granted him a *comitatus*; and therefore, there was no impropriety in ſpeaking of him afterwards, as "the *ſaid* "*Earl* (*b*)."

Fleming Earl of Wigton.

II. The title of honour was underſtood in ancient times to be ſo inſeparably connected with territory, that the firſt grantee, or his heirs, being diveſted of the eſtate of the earldom, from thenceforth ceaſed to enjoy the dignity.

Of this, an example occurs in the earldom of Wigton; which will appear the more appoſite, the more that it is examined.

That the force of this example may be underſtood, there will be occaſion for a ſhort hiſtorical deduction.

Sir Robert Fleming was the companion in arms, and the confident, of Robert Bruce, King of Scotland. He aſſiſted at the ſlaughter of Cumin in 1306 (*a*).

Robert being eſtabliſhed on the throne, rewarded Sir Robert Fleming by a grant of the lands of *Lenzie* and Cumbernald; which were in the crown by the forfeiture of the Cumins (*b*).

He made another grant to Sir Malcolm Fleming, the ſon of Sir Robert, of the lands of Kirkintulloch, which alſo were in the crown by the forfeiture of the Cumins (*c*).

Sir Malcolm Fleming, the ſon of this Sir Malcolm, remained faithful to the Brucian line, at a ſeaſon when loyalty was put to the ſevereſt trial. During the minority of David II. he reſolutely defended the fortreſs of Dumbarton, the laſt reſource of the few remaining followers of the King (*d*).

David II. being eſtabliſhed on the throne, made a grant of a cer-

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*b*) If critical emendations of charters are to be received, it would be a leſs violent conjecture, to ſuppoſe, that *Comiti* was erroneouſly written inſtead of *Thomæ*. There is no end of critical emendations.

(*a*) *Buchanan*, lib. 8. p. 141. Edit. Ruddiman.

(*b*) Evidence referred to in *Crawfurd*'s Peerage, p. 492.

(*c*) Evidence referred to in *Douglas*'s Peerage, p. 694.

(*d*) *Fordun*, lib. 13. c. 28. 29.

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tain territory in Galloway, to be called *the earldom of Wigton*, to Sir Malcolm Fleming, " et hæredibus ſuis legitimè procreatis ſeu pro-" creandis, *per lineam maſculinam deſcendentibus.*" He alſo beſtowed on him a grant of regality, with power to judge in the four pleas of the crown (*e*).

It is probable that David II. intended, by this grant, to circumſcribe the overgrown power of the Douglaſſes, Lords of Galloway, as well as to reward the fidelity of Sir Malcolm Fleming.

The Earl of Wigton accompanied his unfortunate maſter, and, with him, was made priſoner at the battle of Durham (*f*). He was committed to the tower of London (*g*).

He obtained his liberty; but his ſon John was ſent to England as an hoſtage (*h*).

The Earl of Wigton was one of the Scottiſh Commiſſioners for managing the negotiation for the deliverance of David II. (*i*).

His grandſon Thomas was one of the hoſtages for the King's ranſom (*k*).

In 1366, David II. made a new grant of the earldom to this Thomas, ſuſpending at the ſame time the former grant of regality (*l*).

At length this Thomas, 2d Earl of Wigton, ſold the earldom of Wigton to Archibald Douglas Lord of Galloway. One of the cauſes for this deed of ſale was, " The deadly feuds ſubſiſting between " him, and the chief men reſiding within that earldom."

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*e*) 9th November 1342. The charter is printed at full length in Crawfurd's Peerage, p. 464. The King calls him *Alumnus noſter*. This cannot mean one whom the King had educated; but one who had educated the King; a ſenſe not unclaſſical.

(*f*) 1346, *Fordun*, lib. 14. c. 34. Knychton, p. 2590. apud Twiſden.

(*g*) *Rymer*, t. 5. p. 537.

(*h*) Ditto, t. 6. p. 35.

(*i*) *Rymer*, t. 6. p. 43.

(*k*) *Rymer*, t. 6. p. 109. 1358. He is ſtyled, " *Nepos et hæres* Comitis de Wigton;" ſo that his father John was dead.

(*l*) 26th January, an. reg. 37. *Crawfurd*, with great probability, conjectures, that this was owing to the influence of Archibald Douglas Lord of Galloway, who could not brook the erection of a new regality within his territory. *Peerage*, p. 494.

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In this deed he is ſtyled *Thomas Comes de Wigton* (*m*).

Having thus ſold the lands of the earldom, he reſumed the ancient appellation of the family, and ſtyled himſelf, " Thomas Fle-" ming de Fulwood, DUDUM COMES DE WIGTON (*n*)."

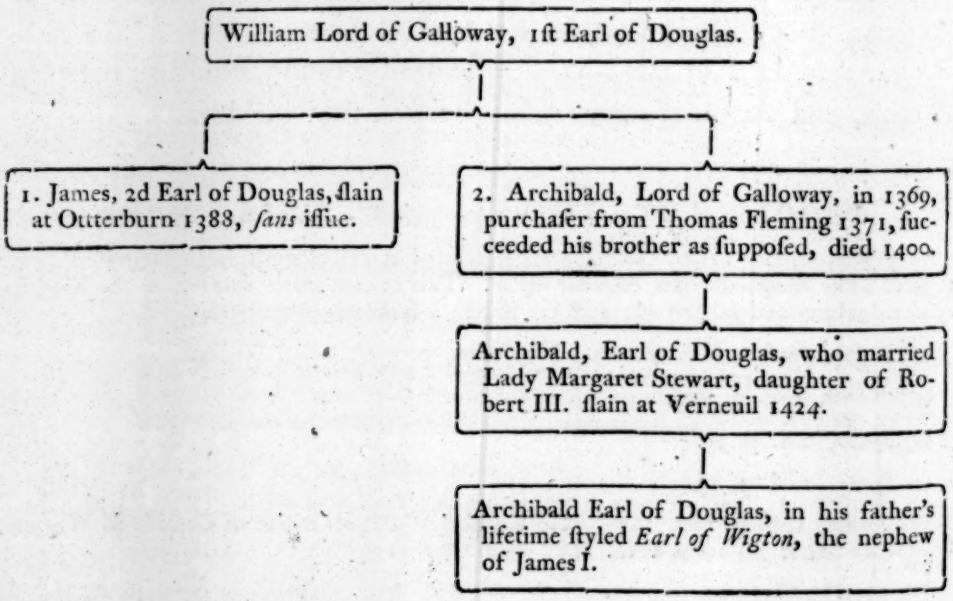
The claimant was formerly miſled by the careleſs averments of our writers who tranſcribe from one another. She imagined that Archibald Lord of Galloway, after obtaining a confirmation of this deed of ſale from the Sovereign, did aſſume the ſtyle of *Earl of Wigton* (*o*). She now admits that there is no evidence that he ever did;

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*m*) 16th July 1371, *Charter* of Confirmation by Robert II. 8th February 1371-2, authenticated copy from the records. The deed of ſale bears, " *Propter* magnas et graves " diſcordias et inimicitias inter me et majores indigenas comitatûs prædicti exortas."

(*n*) Charter of confirmation by Robert II. 20th June 1375, confirming a charter in 1372, granted by the ſaid Thomas Fleming of Fulwood, *dudum Comes de Wigton*, to William Boyd.

(*o*) The claimant, in ſupport of this propoſition, quoted, as others had done, *Charter*, 6th March 1422, granted by Archibald Douglas, deſigned *Archibaldus de Douglas Comes de Wigton*, to Chriſtian Ramſay. Sir Robert Gordon ſaw, that that *Archibaldus Comes de Wigton*, being ſtyled *the nephew of James I.* could not be the *Archibald Lord of Galloway* who purchaſed from Thomas Fleming in 1371; and hence he has well confuted *Mr Dalrymple*'s Hiſtory of Feudal Property, p. 324. Sir Robert's propoſition will become clearer from a pedigree of the Douglas family.



and

and when the fact is fully underſtood, it is not probable that he ever did. As this new earldom of Wigton was compoſed of certain parcels of the country called *Galloway*, it is natural to ſuppoſe, that the Lord of Galloway, having increaſed his territory by the purchaſe in 1371, would rather chuſe to ſuffer the whole to go under one general name, than to ſink the name of his great and ancient lordſhip in that of a parcel comparatively inſignificant.

It is true that Archibald, the grandſon of the Lord of Galloway, uſed the title of *Earl of Wigton*; but this was during the life of his father. After he ſucceeded to the title of Earl of Douglas, he did not uſe the title of Wigton; neither did any of the other Earls of the Douglas line. This ſhews that he had obtained no new grant of the earldom; for then it would have deſcended to his ſucceſſors (*p*).

This *Thomas de Fulwood, dudum Comes de Wigton*, will remain an invincible proof, "that in ancient times the title of honour was underſtood to be ſo inſeparably connected with territory, that the "firſt granter, and his heirs, being diveſted of the eſtate of the "earldom, from thenceforth ceaſed to enjoy the dignity."

This is indeed a difficulty, and therefore Sir Robert Gordon has ſtrenuouſly laboured, either to untie, or to cut the knot.

OBJECTION.

p. 23. He therefore objects, "That it is much more probable that Thomas "Fleming Earl of Wigton loſt the peerage by forfeiture, or by reſigna-"tion into the King's hands *ad perpetuam remanentiam*. From a "charter, 18th April 1373, [not 1379, as in Sir Robert Gordon's Caſe], "it appears, "That Robert Erſkine had got right to the lands of Lenzie, "probably as the King's donatar to the forfeiture of Thomas Fleming. "There is a clauſe in the charter, upon an exchange between Robert "Erſkine and Patrick Fleming, which affords *ſtrong evidence* of Thomas

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*p*) The reaſon why this Archibald alone aſſumed the title of *Earl of Wigton*, may be eaſily diſcovered. During the life of his father, the Earl of Douglas, he ſerved in the French wars. According to the Scottiſh mode of thoſe times, his proper ſtyle was *Archibaldus Magiſter de Douglas*. In France this ſtyle would have been ridiculous. *Le Maitre de Douglas* means the bailiff of the village; and *Magiſter de Douglas*, the ſchoolmaſter. This young lord therefore, with ſome propriety, aſſumed the better-ſounding title of *Comes de Wigton*.

" Earl of Wigton's forfeiture: " Et ſi contingat quod *hæredes antiqui* de " Leignech, per tractatum pacis reformandæ inter Regem Angliæ et Sco- " tiæ, prædictam baroniam de Leignech, tanquam hæreditatem ſuam, re- " cuperaverint." It is true, that in the grant confirmed in 1372, [i. e. " the deed of ſale 1371], Fleming is called *Earl of Wigton*; but this is " only a private deed, and people forfeited are warranted by cuſtom, e- " ven at this day, either to uſe or drop the appellation of *Earl*, as they " ſee fit."

ANSWER.

In the courſe of Sir Robert Gordon's argument, many preſumptions appear. Frequent mention has been made of *preſumed* creations of peers. In one inſtance he argues upon a *preſumed* marriage between a great lady and a perſon unknown; *here* he has carried that ideal argument much further, and he has *preſumed* a forfeiture.

The perſon whom he has ſent into rebellion, and made to incur forfeiture, is Thomas Fleming, head of a family diſtinguiſhed for unremitting fidelity to the Brucian line.

The condition of the forfeiting perſon is ſingular. He loſt his title of honour, but he retained his eſtate: A remarkable circumſtance, not to be parallelled in the ancient hiſtory of Scotland!

There is another defect in this hypotheſis; to make it complete, a rebellion alſo, which has eſcaped the obſervation of hiſtorians, muſt be preſumed. Even rebellion does not in law preſume forfeiture: to preſume both rebellion and forfeiture is rather violent.

The whole of this fabrick, if critically examined, reſts entirely upon the clauſe, " Et ſi contingat quod *hæredes antiqui* de Leignech, per tractatum pa- " cis reformandæ inter Regem Angliæ et Scotiæ, prædictam baroniam de " Leignech, tanquam hæreditatem ſuam, recuperaverint."

Sir Robert preſumes, that the " *hæredes antiqui* de Leignech," [Lenzie], implied *Thomas Fleming, and his heirs*. It has been ſhewn, that the lands of Lenzie belonged to the Cumins. The heirs of that family, ſettled in England, were obviouſly the *hæredes antiqui*; not Thomas Fleming, who, but the year before, had ſold the eſtate.

Had the *diſenheretes* been reſtored by treaty, the grant from the ſovereign to Sir Robert Fleming, and the conveyances by Sir Robert's poſterity, might all have been annulled. *This* was the event, and the only event, provided for by the deed in queſtion (*q*). The fact being once underſtood, the argument for a preſumed forfeiture vaniſhes (*r*).

The

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*q*) The perſon whoſe pretenſions were in view, ſeems to have been David de Strathbogie, the grandſon of Jean Cumin, who, according to our writers, was the ſiſter, but, according to *Dugdale*, the daughter of Cumin, ſlain in 1306, *Baronage*, t. 2. p. 96. This David de Strathbogie was an opulent baron, poſſeſſed of the manor of Holkeham in com. Norf. Gaineſburgh in com. Linc. and many others. He died 1375.

(*r*) The averment, " That, at this day, a perſon forfeited is warranted by cuſtom to " uſe

The ſuppoſition that Thomas Fleming reſigned his title of honour, *ad perpetuam remanentiam*, into the King's hands, or, in more intelligible words, diveſted himſelf of his peerage, without cauſe, and without equivalent, is ſo completely Utopian that it requires no anſwer.

III. There occurs a remarkable example of the connection between titles of honour and lands, in the proceedings of parliament 14th March 1457-8. Earl of Morton, and William de Douglas, 1458.

The Biſhop of Brechin, Chancellor, addreſſing himſelf to James Lord Dalkeith, ſet forth, that the King purpoſed to create him Earl of Morton.

Whereupon William Lord Borthwick appeared in the name and for the behoof of his ſiſter Janet Lady Dalkeith (*s*), and aſſerted, that the ſaid lands of Morton heritably belonged to her, and her ſon William de Douglas; and therefore humbly prayed, that the King might do nothing to the prejudice of his ſiſter and her ſon concerning the ſaid lands of Morton, their inheritance.

To this the Chancellor anſwered, "That the ſaid Lord Dalkeith "was not to receive his title in the earldom [*non intitulari debere in "dicto comitatu*] for the lands of Morton, lying in the lordſhip of "Niddiſdale, but for the lands of Mortoun in the territory of Cal- "dercleir."

Upon which declaration Lord Borthwick took inſtruments in full parliament (*t*).

If

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

"uſe the title of *Earl*," is of no conſequence, when the fact, as to the Earl of Wigton, is once underſtood. The claimant, however, muſt be allowed to doubt of this cuſtom. She is confident that it is unwarrantable.

(*s*) She appears to have been the ſecond wife of the grandfather of the 1ſt Earl of Morton.

(*t*) Notorial inſtrument produced by the claimant. "In Dei nomine, Amen. Per hoc "præſens publicum inſtrumentum, cunctis pateat manifeſtè, quod anno ab Incarnatione "ejuſdem milleſimo quadringenteſimo quinquageſimo ſeptimo, indictione ſextâ, et menſis "Martii die decimâ quartâ, pontificatûs Sanctiſſimi in Chriſto Patris ac Domini noſtri, "Domini Caliſti, divinâ providentiâ, Papæ Tertii, anno tertio, coram Excellentiſſimo "Principe, ac Domino noſtro metuendiſſimo, Domino Jacobo, Rege Scotorum Illuſtriſſi- "mo, et tribus regni ſui ſtatibus, in parliamento apud Edinburgh tento, anno, die, et "menſe

If the title of Earl of Mortoun had been *perſonal*, what poſſible prejudice could that title do to the proprietor of the lands of Morton, or how could it affect his right of inheritance?

But ſuppoſing it to have been *territorial*, the proprietor of the lands of Morton had great cauſe to requeſt an explanation of the King's intentions; for no man can patiently ſee a royal grant of his eſtate made to another.

Stewart Duke of Roſs, &c.

IV. By act 41. parl. 2. James II. 1455, certain lordſhips were unalienably annexed to the crown; and, in particular, "the houſe "and lordſhippe of Brechin, the barrony of Edderdaile, called *Ard-* "*mannach*, and the Reid-caſtle, with the lordſhippe of Roſſe *pertein-* "*ing thereto.*"

Were this ſtatute to be modernized, the expreſſion would be inverted thus, "and the lordſhippe of Roſſe, *with the Reid-caſtle pertein-* "*ing thereto.*"

Nevertheleſs, three centuries ago, *the lordſhip was conſidered as parcel of the caſtle.*

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

"menſe præſcriptis, congregatis. Reverendus in Chriſto Pater, ac Dominus Georgius, "Dei et Apoſtolicæ ſedis gratiâ, Epiſcopus Brechen. Cancellarius Scotiæ, et nomine et ex "parte Domini noſtri Regis, vocavit Magnificum et Potentem Dominum Jacobum, Do- "minum de Dalkeith, et exponendo recitavit, Quod intentionis Domini noſtri Regis fuit, "ipſum Jacobum Dominum Dalkeith creare et facere Comitem, vocand. Comitem de "Mortoune. Tunc vero comparuit Nobilis et Potens Dominus, Willielmus Dominus "Borthwick, et nomine et ex parte ſororis ſuæ Janetæ, Dominæ de Dalkeith, aſſeruit, "Quod dictæ terræ de Mortoune pertinebant ſibi, Dominæ de Dalkeith, et Domino Wil- "lielmo de Douglas filio ſuo, jure hæreditario; propter quod, humiliter imploravit dic- "tum Dominum noſtrum Regem, ut nihil faciat in præjudicium dictæ ſororis ſuæ, et dicti "ſui filii, penes dictas terras de Morton ad ipſos jure hæreditario ſpectan. Tunc vero "dictus Dominus Cancellarius declaravit, Dictum Dominum de Dalkeith *non intitulari de-* "*bere in dicto comitatu* pro terris de Mortoune in dominio de Niddydale exiſtend. ſed pro "terris de Mortoune in Caldercleir jacen. Super qua declaratione, et præmiſſis ſupra re- "citatis, dictus Dominus Borthwick, nomine et ex parte dictæ ſororis ſuæ, a me notario "publico infra ſcripto, ſibi publicum petiit fieri inſtrumentum. Acta erant hæc in preto- "rio burgi de Edinburgh, in dicto parliamento, anno, die, menſe, indictione, et pontifi- "catu, ut ſupra annotatis."

It will not eſcape obſervation, that in this inſtrument *dictus comitatus* is mentioned, although the word *comitatus* had not before occurred. This ſhows, that the idea of "*Co-* "*mitatus* de Mortoun," was at that time implied in the words, "*Comes de Mortoun.*"

James

James III. beſtowed the title of *Marquis of Ormond* on his younger ſon, James Stewart.

This was an empty title, unuſual in Scotland, without territory, and without juriſdiction (*u*).

In 1480-81, the King, purpoſing to beſtow ſomething more ſubſtantial on his ſon, granted a charter to him, and the heirs-male of his body, bearing, " omnes et ſingulas terras comitatûs noſtri de " Roſs, ac caſtrum de Dingwall, cum pertinen. (*v*)."

He alſo granted him another charter, " de omnibus et ſingulis " terris dominiorum de Brechin et Navare, cum pertinen. et de o- " mnibus et ſingulis terris dominii de Ardmanach, nuncupat. " Avauch et Eddirdale, cum monte de Ormond, et caſtro et forta- " licio de Redcaſtle, cum pertinen. (*w*).

Henceforth James Stewart was ſtyled " Comes Roſſiæ, Dominus " de Brechin, Navare, et Ardmanach (*x*).

As moſt of thoſe lands were annexed property, the grant was liable to challenge.

To obviate this a ratification in parliament of the two charters was immediately obtained (*y*).

In 1488, James III. beſtowed the title of *Duke* on the Earl of Roſs (*z*).

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*u*) *Crawfurd*, Officers of State, p. 58. ſays, that it was beſtowed at his chriſtening.

(*v*) *Record* Charters, B. 9. N° 43. 23d January 1480-81.

(*w*) The charter itſelf does not appear; but the ratification in parliament recites it, 12th April 1481.

(*x*) He is ſo ſtyled in the narrative of the ratification juſt now mentioned.

(*y*) B. 9. N° 60. 12th April 1481.

(*z*) 29th January 1487-8. The memorandum in the record has been publiſhed more than once. It runs thus: " Eodem die, Dominus Rex creavit filium ſuum Jacobum, ſe- " cundo genitum, ducem Roſſiæ, Marchionem de Ormond, Comitem de Edradale, aliter " nuncupat. Ardmanach, Dominum de Brechin et Nevar, &c. conceſſit ſibi terras domi- " niorum prædictorum, cum pertinentiis, ſecundum tenorem cartarum et evidentiarum " ſibi deſuper prius confectarum, et nunc etiam confectendarum." The tenor of this memorandum ſhews how looſe and inaccurate ſuch jottings were. One would imagine from it, that the King had created his ſecond ſon *Marquis of Ormond and Lord Brechin and Navare* in 1487-8; and yet it is certain, that not only the King, but the parliament alſo, gave him thoſe appellations *ſeven* years before.

The Duke of Roſs, having embraced an eccleſiaſtical life, became Archbiſhop of St Andrew's, and Commendator of Dunfermline. Poſſeſſed of ſo ample an equivalent, he reſigned his eſtates into the hands of his brother James IV.

According to the ideas of that age, the reſignation of the whole eſtate would have carried with it the titles of honour. Thus, for example, it is plain from act 41. parl. 2. James II. that the reſignation of the *Reid-caſtle* would have carried with it the *dominium* of Roſs "*perteining thereto.*"

For avoiding this conſequence, the Duke of Roſs reſerved either the principal meſſuage, or the *Moote-hill* (*a*) of each eſtate.

That this was with the view of preſerving the titles, is obvious from the following exception in the inſtrument of reſignation: "Re-"ſervato tamen dicto Illuſtriſſimo Principi, et Reverendiſſimo Patri, "*ad vitam*, montem de Dingwall, juxta villam ejuſdem, pro dicto "nomine dignitatis dicti ducatûs [Roſs]; ac montem de Ormond, "pro ſtilo et nomine marchionatûs ejuſdem; necnon Redcaſtle de "Armanoch, pro ſtilo dignitatis ejuſdem comitatûs; et montem "caſtri de Brechin, cum hortis ejuſdem, pro nomine dignitatis "dicti dominii de Brechin et Naver (*b*).

As this prince was an eccleſiaſtic, it is obvious that a perſonal reſervation for life was all that the circumſtances of the caſe required.

The claimant apprehends, that this reſervation points out in the cleareſt manner the connection between territory and titles of honour, in the beginning of the ſixteenth century, and but a few years before the ſucceſſion of Sutherland opened to an heir-general.

It ſhews that no perſon was ſuppoſed capable of holding a title of honour, unleſs he was poſſeſſed of ſome territory correſponding to it.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*a*) *Mons placiti*, or more ſhortly *Mons*, the place where courts were held, and juſtice executed.

(*b*) *Authenticated copy* of the original inſtrument, 15th May 1503.

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OBJECTION.

" As this peerage was created by *inveſtiture* in parliament 1487-8, " and certainly was not territorial, the argument drawn from the Duke's " reſerving the mounts in his three eſtates to prove, that he could not " without doing ſo reſerve his *three* peerages, falls to the ground. At " this day it is *very common* in Scotland, when a man ſells his family- " eſtate, to reſerve a piece of old wall, to preſerve the remembrance of " his antiquity, and indulge his vanity. Legal argument cannot be rai- " ſed upon ſuch foundation."

ANSWER.

From what has been already obſerved, it is certain that the peerages of Brechin and Naver were not created in parliament 1487-8, but had exiſted for *ſeven* years before. That the other peerages were created by inveſtiture in parliament, does not appear. The memorandum ſeems rather to import, that the King had ordered charters to be drawn up, conferring them; for ſuch is the natural meaning of the expreſſion, " ſecundum tenorem cartarum et evidentiarum " ſibi deſuper prius confectarum, et nunc etiam confectendarum."

The claimant will not poſitively ſay, that the titles of *Duke* and *Marquis* were at that time *territorial*. They were borrowed from the Engliſh about a century before, ſeldom uſed, and ſcarcely at all, unleſs in the royal family. It ſeems plain, that *Albany* was not a territorial title. In all probability, the retaining a mount for the titles of Roſs and Ormond, has been from analogy, and in imitation of the caſe of earldoms and lordſhips.

As to what is ſaid, of " its being very common in Scotland, when a man ſells " his family-eſtate, to reſerve a piece of old wall, to preſerve the remembrance " of his antiquity, and indulge his vanity," the claimant fairly acknowledges that it is new to her; and ſhe could have wiſhed that a few examples had been produced of a practice ſo very common in Scotland (*c*).

Beſides, were the practice ſuch as it has been repreſented, it would not apply

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*c*) The claimant never heard of any example of this kind but one; and, if ſhe miſtakes not its circumſtances, it will be found to be far from proving Sir Robert Gordon's propoſition.

A certain gentleman, ſtudious of antiquities, bought an eſtate. He afterwards ſold it; but retained a caſtle on it. Not *a piece of old wall*; but a venerable pile of ancient architecture. If the claimant is not miſinformed, he had an additional reaſon for retaining this caſtle; beſides his reſpect to antiquity, there was an apartment in it wherein he kept his library.

It is true, that various examples have occurred of eſtates ſold, with the reſervation of the family-ſepulchre; but ſurely *that* is foreign to the matter in iſſue.

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to the case of the Duke of Ross. The titles of honour had been acquired by the son and brother of the King of Scots; by reason of his clerical celibacy they were necessarily to terminate with his own life. A prince, an ecclesiastic of the Romish church, could never have retained a castle or a mount "to preserve the "remembrance of his antiquity, and indulge his vanity!"

Some other detached objections, urged by Sir Robert Gordon against the *fourth* proposition, shall now be considered.

OBJECTION I.

p. 24. "The connection between the *comitatus*, or *dominium*, and the peer-"age, is so insignificant, that a variety of instances can be shewn, where "the *dominium* itself is conveyed, and yet the peerage does not follow "the grant."

In proof of this proposition six examples are produced.

1. Robert Bruce, the father, was Earl of Carrick in 1293, 1294, and 1296; and yet, in 1293, the *comitatus* went from him to his son.

2. 8th June 1362, *an. reg.* 34, David II. gave an original grant of the *comitatus* of Fife to Thomas Bisset; and yet he was a commoner in 1366.

3. 1371, Thomas Fleming, Earl of Wigton, sold the *comitatus* of Wigton to Archibald Douglas; yet Archibald did not thereby become a peer.

4. The *comitatus* of Buchan, prior to 12th March 1406, had been transferred to John, son to Robert Duke of Albany; and yet he continued a commoner.

5. 22d April 1581, James VI. granted the earldom of Arran to Captain James Stewart; and, on 8th October 1581, gave him a patent creating him Earl.

6. 5th June 1581, James VI. granted the earldom of Morton to John Lord Maxwell; and, on the 29th October 1581, gave him a patent creating him Earl.

ANSWER.

Why Sir Robert should have produced those six, as examples of a *dominium* being conveyed, is hard to say, since not one of them mentions a *dominium* (*d*). He meant to speak of the conveyance of a *comitatus*.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*d*) It is probably an error in writing, or in printing, of which there is an innumerable multitude in Sir Robert's Case. His doer has exhibited what is called a *rectified copy*. The number of errors in *the rectified copy* is very great.

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The *firſt* example, of the earldom of Carrick, will be fully obviated in chap. 5. § 5.; and it will be ſhewn, that Robert Bruce the elder [*i. e.* the ſon of the competitor] laid aſide the title, and that Robert Bruce the younger [*i. e.* Robert I.] aſſumed it.

The *ſecond* example, of Fife, is exceedingly erroneous. The firſt writing which Sir Robert quotes for proving, that after the grant of the *comitatus* of Fife, in 1362, Thomas Biſſet continued a commoner is, 1. A protection by Edward III. to Thomas Biſſet, for his lands of Upſetelyngton, Lambden, and Kymbrynham, [in the county of Marche, *vulg.* Merſe, or Berwickſhire]. *Rymer*, t. 6. p. 129. Unluckily this protection is dated in 1359, ſeveral years before the grant of the *comitatus* of Fife; and therefore it only proves, that Thomas Biſſet did not take the title of *Comes*, before he obtained the *comitatus*.

2. A charter by David II. in 1366, b. 1. N° 125. David II. an. reg. 36. This charter confirms a grant by Thomas Biſſet in 1362. According to Sir Robert Gordon the grant runs thus: "Thomas Byſet, Dominus de Upſechyn-"ton: Noveritis nos dotaſſe Yſabellam de Fyf, Dominam ejuſdem." There follows in the record in the grant, "ante matrimonium inter me et ipſam, in "facie eccleſiæ celebrat." This was rather too material a clauſe to be ſo careleſsly omitted. Indeed the date of the grant by Thomas Biſſet, 10th January 1362-3, ſhews, that it was prior to the grant of the *comitatus*. Sept 1370 is a. r. 41. *Ruddiman*, Notes on Buchanan, p. 167. Hence Sept. 1363 is a. r. 34. It follows, that 8th June, a. r. 34. can never be 1362. It is 1363.

3. A paſſport by Edward III. to "*Thomas Biſſet de Scotia*, cum duobus "ſociis equitibus." *Rymer*, t. 6. p. 497.

There is not the moſt remote probability that this perſon was the ſame with *Thomas Byſet de Upſetlyngton*, *Miles*, to whom, in 1363, David II. granted "*totum comitatum de Fyfe.*" The ſmallneſs of the retinue, no greater than what a Scots pedlar would have had in thoſe days, is of itſelf ſufficient to ſhew, that the *Thomas Biſſet de Scotia* was ſome landleſs obſcure perſon, and not the man who was poſſeſſed of the *comitatus* of Fife.

Thus it appears, that the name of Thomas Biſſet never occurs directly in hiſtory, or record, after the grant made to him of the *comitatus* of Fife; and conſequently, that Sir Robert Gordon can draw no inference whatever from all the authorities which he has here accumulated.

Although no direct mention is made, either in hiſtory or record, of Thomas Biſſet after he obtained the *comitatus* of Fife, yet there is evidence that he was ſtyled *Comes*. *Fordun*, l. 6. c. 53. ſpeaking of the Priors of St Andrew's, has the following words: "Electus eſt vir nobilis progenie, ſed moribus nobilior, "Dominus Thomas Biſſet, nepos *Domini Thomæ Biſſet Comitis de Fyfe.*"

The *third* inſtance, as to Wigton, has been already explained, and the reaſon given, why Archibald Lord of Galloway did not aſſume the title of *Earl of Wigton.*

The *fourth* alſo, of Buchan, has already received what the claimant is confident will be held a ſatisfactory anſwer.

As to the *fifth* inſtance, of Arran, it is of no conſequence, although the caſe had been as repreſented by Sir Robert Gordon.

1. It is the caſe of a peerage by patent, ſo late as 1581: and ſurely the queſtion concerning an ancient territorial peerage, which exiſted towards the be-

ginning of the 13th century, will not be determined by the circumſtances of a peerage by patent which is no earlier than the end of the 16th century.

2. The patent to the Earl of Arran bears date on the 28th, not on the 8th, October 1581. Now the record of parliament, 24th October 1581, mentions, "Jacobum *Aranię Comitem*, Dominum Hamiltoun, &c. (*e*)." This proves inconteſtably, that Captain James Stewart aſſumed the title of *Earl of Arran* before obtaining the patent (*f*).

As to the *ſixth* inſtance, of Morton, ſuppoſing the date referred to in the patent of Nithſdale 1620 to be juſt, it reſpects a peerage by patent ſo late as in 1581; and therefore can be of no avail in determining a queſtion concerning an ancient territorial peerage.

OBJECTION II.

p. 22. "From the evidence of the records of Scotland that remain, there is "no room to conclude, that a ſimple *erection* of a land-eſtate, without "ſpecial words of creation, could make a man a peer; neither is there "any thing whence to determine with preciſion the antiquity of any "particular form of creating peers in Scotland, ſo as to ſhew that one "form was more ancient than another. The creation of peers by in-"veſtiture in parliament, appears to be as ancient as the records of par-"liament now extant: and the mode of creation by patent, may be as "ancient, either as that by creation or inveſtiture in parliament; for "the ratification of the patent of Glencairn, in the year 1637, proves, that "that peerage had been created by patent as far back as the year 1488.

"One of the moſt ancient charters of lands now on record, contain-"ing a creation of a peerage, is in the rolls of Robert I. That prince "created his brother Edward Bruce Earl of Carrick, and gives him "the eſtate of the earldom, *cum nomine*, *jure*, *et dignitate Comitis*. "Theſe words of creation would have been nugatory and ſuperfluous, "if the bare poſſeſſion of the eſtate by virtue of the grant, would have "made Edward a peer.

"There is another inſtance of the ſame ſort in the creation of the "Earl of Wigton by David II.; only, in the laſt, the lands had not before "been called an earldom. If the evidence of the records, therefore, were "to determine the point, peerages of all ſorts are mere perſonal grants, "without any relation to lands whatever (*g*)."

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*e*) Certificate from parliamentary record produced.

(*f*) That vainglorious and profligate man ſought to paſs for the right heir of the houſe of Hamilton, and in that quality aſſumed the title of *Arran*. Being abſolute maſter of Scotland, he took a patent in confirmation of his ideal pretenſions. See *Crawfurd*, Officers of State, p. 137. How he was deprived of his honours, and ſtripped of his borrowed ſpoils, is recorded with peculiar elegance and perſpicuity by *Robertſon*, vol. 2. p. 116.-118.

(*g*) Prefixed to this objection there is a ſtate of the claimant's argument, ſuch as S. Robe-

ANSWER.

When the premiſſes are more fully conſidered, it will appear, that Sir Robert Gordon has been too precipitate in his concluſion. The particulars ſhall be ſeparately conſidered.

1. It is ſaid, "That, from the evidence of the records of Scotland that remain, there is no room to conclude, that *a ſimple erection of a land eſtate*, without ſpecial words of creation, could make a man a peer."

By *ſimple erection of a land-eſtate*, Sir Robert Gordon muſt mean, by *erecting lands into a comitatus or earldom*; for *an erection of a land-eſtate*, without ſome correlative, are words without meaning (*h*).

As *this* muſt be the ſenſe of the paſſage, if it has any determined ſenſe at all, let this one queſtion be aſked, When lands were erected, *tenend. in libero comitatu*, what was the title of the tenant? It muſt have been either that of *Comes*, or none at all. If it was *Comes*, then this correſponds with the whole tenor of the claimant's argument; and is indeed juſt what ſhe has already enforced, and propoſes hereafter to enforce.

But if he who held a *comitatus* had no title at all in conſequence of ſuch holding, his caſe was ſingular indeed!

No one ever doubted that he who obtained lands *tenend. in dominio*, was ſtyled *Dominus*; or that he who obtained lands erected *in unam liberam baroniam*, was ſtyled *Baro*.

Land within a borough, granted *in libero burgagio*, could not be poſſeſſed by the grantee, without intitling him to the appellation of *Burgenſis*.

When a chapter conferred *munus et officium epiſcopi* upon a perſon, he became *Epiſcopus*; and, *vice verſâ*, being *Epiſcopus*, he held the *epiſcopatus*.

The ſame correlative expreſſions run through the whole law of Scotland; as *thanagium* and *Thanus*, *firma* and *firmarius*, *emphyteuſis* and *emphyteuta*, and ſo of the reſt. But it would ſeem, and it is an amazing diſcovery, that he who was of a rank more eminent, and held his lands *in libero comitatu*, had no appellation at all in conſequence of his poſſeſſion of a *liber comitatus*.

When ſuch a perſon appeared at the King's head court, the claimant deſires

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

Robert is pleaſed to make it. Among other things, Sir Robert makes the claimant ſay, "That the *preſent* inveſtitures of the eſtate are to heirs of entail; and as *theſe* direct the limitation of the peerage, it muſt go to Lady Eliſabeth, the heir of entail."

Sir Robert Gordon may manage his own argument according to his fancy, but he is intreated not to circumſcribe that of the claimant according to his fancy.

(*h*) The technical phraſes of the law of any country found uncouth to an ear not habituated to them. Sir Robert Gordon, by uſing the expreſſion in the text, without the addition of *into*, has made it ſtill more uncouth, and indeed unintelligible. "The erection of church-lands *into* a temporal lordſhip," is well known in the law of Scotland; but "the erection of church-lands," without the relative *into*, would be *arena ſine calce*, words without connection, inferring nothing.

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to know, in what manner *did* the clerk of court, and indeed in what manner *could* he mark his appearance?

The claimant contends that he marked his appearance thus: *Intrat*, or *Præſent. A. Com. de B.* Sir Robert Gordon, on the contrary, thus: *Intrat*, or *Præſent. A. qui tenet terras de B. in libero comitatu.*

It is hoped that Sir Robert Gordon will be called upon to ſay, whether *this* ought to have been the form of the entry; and if not, what it ought to have been.

2. It is ſaid, "Neither is there any thing whence to determine with preciſion the antiquity of any particular form of creating peers in Scotland, ſo as "to ſhew that one form was more ancient than another."

Whether the evidence produced for the claimant, in the courſe of her argument, is conſiſtent with this modeſt ſcepticiſm, every impartial reader will judge.

Sir Robert Gordon admits, that we have records from about the 1300, and yet the *firſt* creation in parliament, that he can point out, is of Lord Home in 1473; ſo *here* are near two centuries which he would lay out of the account.

But ſays he, "The creation of peers by inveſtiture in parliament appears to "be as ancient as the records of parliament now extant."

How is it poſſible that *this can appear?* The certificate of the keeper of the record bears, that the records of parliament now extant begin in 1424; and yet the *firſt* inveſtiture in parliament, as it is called, bears date in 1473.

Here again there are *fifty* years of record which Sir Robert Gordon would lay out of the account.

3. In order to render charters, inveſtitures in parliament, and patents, all coeval, Sir Robert Gordon adds, "That the mode of creation may be as ancient, "either as that by charter of creation or inveſtiture in parliament; for the ratification of the patent of Glencairn in 1637 proves, that that peerage had been "created by patent as far back as the year 1488."

Charles I. ſays, in the patent 1637, that, in 1488, James III. had, *per ſuas literas patentes*, granted the dignity of Earl of Glencairn to Alexander Lord Kilmaurs. Sir Robert Gordon catches at the ſound of the words, and confidently ſpeaks of the peerage of Glencairn having been created by *patent* in 1488.

The claimant muſt beg leave to diſpute the propriety of this interpretation.

[1.] In our charter Latin, *a patent* is *diploma*, not *literæ patentes*. The reference to the grant 1488 affords no evidence of the antiquity of what is properly called *a patent of honour*; for charters no leſs than patents are *literæ patentes*, when oppoſed to *literæ clauſæ* (*i*).

[2.] It

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*i*) Every one knows the diſtinction. "Omnibus hanc cartam viſuris vel audituris ſa"lutem, Jacobus," &c. imports *literæ patentes*; but Jacobus, &c. "Vicecomiti de A. ſa"lutem," imports *literæ clauſæ*. A few examples, ſhewing the import of the words *literæ patentes*, ſhall be here ſubjoined.

1. In 1171, William the Lion promiſed to grant the earldom of Moray to Morgund, ſon of Gillocherus Earl of Marr. To his promiſe he ſubjoins theſe words: "Et ut hoc "factum meum aliis certificaretur, prædicto Morgundo has *literas* meas dedi *patentes*."

The

[2.] It is highly improbable that there ſhould have been one *diploma* or *patent of honour*, properly ſo called, in 1488, and yet that there ſhould not have been a ſecond *diploma* on the records, for near a century after.

[3.] When titles of honour came to be beſtowed, in the reign of James VI. they were beſtowed in the ſame inſtrument with the grant of the eſtate; and yet *here* it is ſuppoſed, that, a century before, there were two grants, one of the *comitatus*, and another of the dignity of *Comes*; in other words, that in the courſe of the *ſixteenth* century, inſtruments became leſs numerous and verboſe than in the *fifteenth*; the contrary of which is certain in every other inſtance.

[4.] In 1606, as is elſewhere obſerved, the Earls of Eglintoun and Caſſilis obtained a decree of the privy council, preferring them in the order of parliament to the Earl of Glencairn; but, on the 15th June 1609, the Earl of Glencairn obtained a decree of the court of ſeſſion, annulling that preference, for the following reaſon, "That the purſuer's predeceſſor was created Earl of Glencairn by James III. in the month of May 1488, before which time the defendants cannot ſhow that the dignity of an earldom was granted to either of them."

In proof of this, there was produced a charter, with an infeoffment, granted by James III. to the Earl's predeceſſor, dated in May 1488.

Unhappily thoſe inſtruments are not upon record; but as there is no example of an infeoffment on a patent of honour, it is evident that Alexander Lord Kilmaurs muſt have been created in the uſual form, by an erection of the eſtate of Glencairn into an earldom.

[5.] The patent 1637 itſelf ſhews, that the *literæ patentes*, 28th May 1488, were not a *patent of honour* or *diploma*. Charles I. thereby confirms the foreſaid *literæ patentes*, "cum omnibus aliis *literis patentibus*, ſcriptis, et evidentiis, præfato quondam Alexandro Comiti de Glencairn, vel alicui ipſius præceſſorum aut ſucceſſorum, quoad attinet dictum honorem et dignitatem Comitis *tantummodo*, datis et conceſſis."

Now it muſt be admitted, that *a patent of honour*, properly ſo called, relates to the dignity, and to nothing elſe; and yet it is ſuppoſed by Charles I. that the *literæ patentes* mentioned in the patent 1637, might relate to ſomething elſe

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

The inſtrument itſelf is preſerved in *Selden*, Titles of Honour, p. 848.; and let every reader judge, whether it is a *patent* of the earldom of Moray, or not.

2. In 1370, William Earl of Roſs reſigned his earldom, *per ſuas literas patentes*. Retord Charters, b. 1. N° 258.

3. Eliſabeth, the heireſs of Sir Adam Gordon, married Alexander Seton. A royal charter was granted to him, "et Eliſabeth de Gordon, filiæ et hæredi quondam Adæ de Gordon, Militis," of the baronies of Gordon, Huntly, and Strathbolgy, &c. "Quæ quidem baroniæ et terræ, cum pertinentiis, fuerunt dictæ Eliſabeth; et quas *eadem Eliſabeth, in ſua libera virginitate, &c.* in concilio noſtro, tento apud Perth, in præſentia plurium regni Prælatorum, Comitum, Baronum, &c. aliorum procerum et nobilium, nobis, per fuſtem et baculum, et ſuas *literas patentes*, ſurſum reddidit, purè et ſimpliciter reſignavit," &c. *Record* Charters, Roll 2. N° 32.

It is needleſs to obſerve, that in this ſection the arguments of *Lord Kames*'s Eſſay, *Honour*, *Dignity*, have been adopted and enforced.

than the dignity, " quoad attinet dictum honorem et dignitatem Comitis *tan-*
" *tummodo.*"

4. Sir Robert proceeds to obſerve, " That one of the moſt ancient charters
" of land on record, containing a creation of a peerage, is in the rolls of Ro-
" bert I. That prince created his brother Edward Bruce Earl of Carrick, and
" gives him the eſtate of the earldom, *cum nomine, jure, et dignitate Comitis.*
" Theſe words of creation would have been nugatory and ſuperfluous, if the
" bare poſſeſſion of the eſtate, by virtue of the grant, would have made Ed-
" ward a peer."

Againſt a multitude of charters granting a *comitatus*, or granting lands to be held *in libero comitatu*, Sir Robert Gordon ſets up one ſingle grant to Edward Bruce, where the *comitatus* is given with the addition of the words, *cum nomine, jure, et dignitate Comitis.* The claimant ſays, *one ſingle grant;* for ſhe will immediately prove, that the other example, of Wigton, is nothing to the purpoſe.

Sir Robert urges, " That if the poſſeſſion of the lands (*k*) made Edward
" Bruce a peer, the words of the creation would have been *nugatory and ſuper-*
" *fluous.*"

Thus, leſt ſix words in a charter ſhould be held *ſuperfluous*, a continued ſeries of creations for ſeveral centuries muſt be preſumed, contrary to every form known in hiſtory or record; and all this for the credit of the accuracy and conciſeneſs of a charter, confuſedly expreſſed, and replete with tautology.

The framer of that inſtrument dilates the expreſſion *hæredibus maſculis de corpore* thus: " et hæredum ſuorum maſculorum exeuntibus, et tantummodo
" per lineam directam et maſculinam continuò deſcendentibus; niſi caſu in quo
" plures fuerint germani ſuperſtites; in quo caſu, decedente primogenito, vel
" deficiente, ſine hæredibus maſculis de corpore ſuo procreatis, ſecundò geni-
" tus in dictum comitatum hereditariè eidem ſuccedat; et ſic de aliis, et eorum
" hæredibus."

Even our own age, verboſe as it may be in the form of grants, will acknowledge, that thoſe proviſos are wholly *nugatory and ſuperfluous*, and yet *they* compoſe the greater part of the grant to Edward Bruce.

The truth is, as has been heretofore obſerved, that the framer of this charter being obliged to depart from the common ſtyle, imagined that he could not be too minute in his deſcriptions.

From the ſame cauſe the uncommon words, *cum nomine, jure, et dignitate Comitis*, have been thrown in: and indeed it was in ſome ſort expedient that the intention of the ſovereign ſhould be repeated and enforced, ſeeing that this charter directly tended to the diſinheriſon of his only child Marjory.

5. It is further ſaid, " That there is another inſtance of the ſame ſort in the
" creation of the Earl of Wigtoun by David II. only in this laſt the lands had
" not before been called an earldom."

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*k*) By " *poſſeſſion of the lands,*" the claimant preſumes that Sir Robert means " lands
" *tenend. in libero comitatu*;" at the ſame time, it were to be wiſhed that he had ſpoken with more preciſion.

This

This is altogether a miſtake, as will at once appear when the words of that charter are recited.

After having granted, " terras de Faryes, et del Rynnes, et totum burgum " noſtrum de Wigtoun, tenend. *in liberum comitatum*," the Sovereign adds, " et cùm dictus locus de Wigtoun pro principali manerio totius vicecomitatûs " de Wigtoun habebatur, ordinamus, et perpetuo confirmamus, ut ipſe Mal- " colmus, et hæredes ſui prædicti, ABINDE *nomen Comitis* accipiant, et Comes " de Wigtoun de cætero nuncupantur."

Here the lands to be held *in liberum comitatum* were compoſed of different parcels, with various names, and had not formerly been erected into a *comitatus*.

In thoſe circumſtances it became neceſſary for the Sovereign to determine what title the grantee was to aſſume: without ſuch determination, the grantee might have ſtyled himſelf Earl of *Faryes*, or Earl of *Rynnes*, no leſs properly than Earl of *Wigtoun*.

It muſt be obvious to every one who peruſes this charter, that the grant conferred on Malcolm Fleming the *dignity of Earl*; whereas that clauſe to which Sir Robert Gordon has recourſe, did no more than remove any ambiguity in his *ſtyle*.

OBJECTION III.

p. 24. 25. " Lady Eliſabeth's doctrine would create a number of peerages " which never were created, there being many inſtances of *dominia* in " charters, and yet peerages of ſuch denominations never were heard " of; as *dominium de Sky*, *Glendowach*, *Strathbolgy*, *Buchquhidder*, " *Ewiſdale*.

ANSWER.

The examples are ill choſen. It is certain that each of thoſe *dominia* was termed a *lordſhip* (*l*); and there can be no doubt that every *dominium* would have intitled the holder to all the privileges of a lord of parliament, before the great alteration introduced by ſtatute 123. 1587. *

OBJECTION IV.

p. 25. " The territory is not a conſequence of the title of honour, and often " not a concomitant of it; there being many inſtances of mere perſonal

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*l*) It would appear, that Sir Robert Gordon will not permit the Duke of Buccleugh to be Lord Ewiſdale, nor the Duke of Gordon to be Lord Strathbolgy.

* " peerages,

H3 By act 1503 cap 78 all were accounted great Barons, who held 100 merk land or above of the Crown and the rest minor Barons. See Hair B2 Tit: 3 § 2

" peerages, as thoſe of the Earls of *March* and *Mariſchal*, which *behoved*
" *to have been originally official.* Some have their titles from towns,
" as the Earl of *Dunbar*; and very ancient ones, wherein the peer is
" not deſigned from lands or territory, but Earl ſimply, without addi-
" tion but that of his name, thus, *Duncanus Comes*, *Maliſe Comes*;
" whereof are many examples in *Anderſon's Diplomata Scotiæ.*"

ANSWER.

This is not expreſſed with preciſion; however, as Sir Robert Gordon's argument relates to ancient peerages, it muſt be ſuppoſed that he is *here* ſpeaking of ancient peerages.

It is ſaid, 1. " That the peerage of March behoved to have been originally
" official."

Sir Robert does not recollect, that *la Marche*, now corruptedly called *the Merſe*, is a tract of country. One of the caſtles of the family of Marche was *Colbrandſpath*, the paſs which leads from the *Merſe* into Eaſt Lothian. Why *Marche* ſhould be a perſonal peerage, more than Lennox, Athol, or Buchan, is difficult to ſay.

That the peerage of March was originally territorial, appears from the hiſtory of the eſtabliſhment of that family in Scotland. Goſpatrick Earl of Northumberland fled from the reſentment of William the Conqueror, and took refuge with Malcolm III. " On him Malcolm beſtowed Dunbar, *cum adjacentibus*
" *terris in Lodoneio*, for the ſupport of himſelf and his followers, until the re-
" turn of more proſperous times (*m*)."

It is ſaid, 2. " That the peerage of *Mariſchal* behoved to have been originally
" official."

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*m*) " Tenuit autem Coſpatricius comitatum donec ei Rex auferret, imponens illi, quod
" conſilio et auxilio affuit illis, qui Comitem Robertum Cumin cum ſuis in Dunelmo peri-
" merant, licet ipſe ibi præſens non fuiſſet, et quia in parte hoſtium fuiſſet cùm Norman-
" ni apud Eboracum necarentur. Fugiens ergo ad Malcolmum, non multò pòſt Flandri-
" am navigio petit; cui poſt aliquantum tempus Scotiam reverſo, donavit ei Rex *Dunbar*,
" *cum adjacentibus terris* in Lodoneio [l. Laudonia, the ſouth-eaſt parts of Scotland, to
" the ſouth of the Forth], ut ex his, donec lætiora tempora redirent, ſe ſuoſque procura-
" ret."

It is probable, that Malcolm, by reaſon of his long reſidence in England, placed more truſt in this Northumbrian Lord than in his own ſubjects; yet it was a hazardous ſtroke in policy, and it proved exceedingly hurtful to Scotland. Any one acquainted with the geography of Scotland, knows that the poſſeſſor of the caſtles of Colbrandſpath and Dunbar held the keys of the kingdom. In the ſucceſſion of ages, that independency which the ſituation of the March eſtate ſuggeſted to the poſterity of Goſpatrick, was ſenſibly felt. Of this many well-known examples might be given. One ſhall be mentioned, not ſo generally known. After the battle of Bannockburn, " Counte Patrick of Marche full gentely re-
" ceived King Edward into his caſtel of Dunbar." *Scalæ Chr.* apud Leland, *Collectanea*, vol. 1. p. 547.

Sir

Sir Robert Gordon muſt certainly know, that *Keith, Mariſchal of Scotland*, exiſted before 1174; whereas *Keith Earl Mariſchal* was never heard of until 1458. He cannot ſeriouſly conſider a peerage which did not exiſt till 1458 as an ancient peerage in the preſent argument.

But further, there is all imaginable reaſon to ſuppoſe, that the peerage of Mariſchal was rather territorial than official; for that Robert I. granted "Ro-" berto de Keth, Militi, terras de Keth-Mareſcal, *cum officio Mareſcallæ regni* " *noſtri, eidem terræ pertinen.* cum omnibus libertatibus et pertinen. eiſdem " terris et officio pertinentibus (*n*)."

Here the lands and the office are not only granted together, but it is ſaid in words plain and unequivocal, that *the office pertained unto the eſtate.*

The charter of the earldom of Mariſchal does not exiſt. The preſumption is, that it was conceived in terms ſimilar to this grant in favour of "Robertus de " Keth, Miles."

It is ſaid, 3*dly*, "That ſome Earls have their titles from towns, as the *Earl of* " *Dunbar.*"

The claimant preſumes, that Sir Robert Gordon here means the Earl of March, ſometimes called *Comes de Dunbar*; for it would not be doing juſtice to his argument to ſuppoſe, that he meant Sir George Home, created Earl of Dunbar by James VI. in 1608.

That the Earl of March was ſtyled *Comes de Dunbar* from the borough of that name, is a ſtrange imagination. Waldeve, the fourth from Goſpatrick Earl of Northumberland, was ſtyled *Comes de Dunbar* in 1174. *Rymer*, t. 1. p. 39. Does Sir Robert imagine that the town of Dunbar exiſted in the reign of William the Lion? Whether the proper ſtyle of the family was *de la Marche*, or *de Dunbar*, is not certain; nor is it material. Although the proper ſtyle had been *de la Marche*, this would have been very conſiſtent with the ſtyle *de Dunbar* being uſed. Of this there are various examples in England while earldoms remained territorial. Thus the Earl of Suſſex, from his reſidence at Arundel-caſtle, was frequently ſtyled Earl of Arundel; and for a like reaſon, Ferrers Earl of Derby, was ſtyled Earl of Tutbury.

The moſt remarkable example of all is, that of the celebrated Gilbert Strongbow Earl of Pembroke. He was ſometimes ſtyled Earl of Striguil, by reaſon that he had his chief reſidence at Striguil-caſtle, near Chepſtow in Monmouthſhire (*o*).

The Earls of March may have uſed the title *de Dunbar* on account of their chief reſidence being at the caſtle of that name (*p*).

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*n*) *Charter*, Advocate's Library, A. 4. 16. There is produced a certified copy by the librarian.

(*o*) *Dugdale*, Introduction to Baronage.

(*p*) Froiſſart, who was perſonally acquainted with George, 11th Earl of March, calls him "Le Comte George de la March et de Dunbar," tom. 3. l. 126. *Dunbar*, in the Gaelic language, anſwers nearly to the Engliſh *Topcliff*, or *Hillhead*. In Lothian, the names of the hills and rivers are Gaelic; whereas the names of even the moſt ancient villages and hamlets are generally Saxon. This ſhews, that the Saxons once poſſeſſed the country, and that they ſucceeded ſome nation of a different language.

It is ſaid, 4*thly*, "that in very ancient earldoms, the peer is not deſigned from lands or territory, but *Earl* ſimply, as *Duncanus Comes*, *Maliſe Comes*; and for this reference is made to *Anderſon's Diplomata Scotiæ*.

If Sir Robert Gordon had quoted Sir James Dalrymple's Collections, a book as well known as *Anderſon's Diplomata*, he would have brought his own confutation along with him. When there were few Earls, and thoſe little connected with each other, the Chriſtian name was generally a ſufficient diſtinction, without adding *Comes de Fyfe* to *Duncanus*, or *Comes de Strathern* to *Maliſe* (*q*). To argue from this practice, that ſuch Earls were not territorial, but a ſpecies of Earls in the abſtract, does not imply great attention to the antiquities of Scotland.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*q*) See *Sir James Dalrymple's* Collections, p. 376. &c.

CHAP. V.

CHAP. V.

Titles of Honour deſcendible to Females.

AS in ancient times land-eſtates and juriſdictions in Scotland were deſcendible to females as *heirs-general*; ſo, in like manner, ancient territorial peerages were deſcendible, and did *de facto* deſcend, to females.

INTRODUCTION.

Introduction.

BY means of an extenſive ſearch into hiſtory and record, the claimant is enabled to treat of this ſubject with more preciſion than is to be found in any former inquiries into the ſtate of ancient Scottiſh peerages.

For obtaining a juſt idea of the manner of ſucceſſion in ancient Scottiſh earldoms, it is of great conſequence to procure a catalogue of them as they ſtood at ſome very diſtant period.

This catalogue being once procured, the next object of inquiry will be, In what manner did thoſe earldoms deſcend? and by whom were they enjoyed? or, in other words, to exhibit an "hiſtory of "the fate of the ancient earldoms of Scotland."

Fortunately ſuch a catalogue ſtill exiſts; and with it this inquiry ſhall commence.

After the untimely death of the only ſon of Alexander III. (*a*),

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*a*) "Alexander regni futurus ſperatus hæres, A. D. 1283, apud Londoris, obiit, ſepul-"tuſque eſt in Dunfermlyn in feſto Sanctæ Agnetis ſecundo [28th January]." *Fordun*, lib. 10. c. 37. This hiſtorian fixes the burial of the Prince of Scotland to the 28th January 1283-4. The period between his death and funeral could not be conſiderable. The parliament aſſembled about a week after his funeral.

Introduction. the King and his nobles ſaw it expedient to ſettle the ſucceſſion. His grand-daughter, Margaret Princeſs of Norway, was the neareſt heir in right of blood; but ſhe was an infant, born and reſiding in a foreign country. In the event of her grandfather's demiſe, her right of ſucceſſion might be diſputed, competitors preſent themſelves, diſcord and anarchy enſue. The moſt prudent meaſures were taken to prevent the evils foreſeen.

In a parliament held at Scone, 5th February 1283-4, the Scottiſh nobles became bound, in certain events, to acknowledge the Damſel of Norway as their ſovereign (*b*).

This was a great national meaſure; and accordingly it appears, that all the earls, and many of the great barons of Scotland, concurred in it.

In what order the earls are ranked in this inſtrument, is a matter which concerns not the preſent controverſy. The claimant will therefore rank them in that order which may beſt conduce to the elucidation of what follows in her argument.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*b*) "Obligamus nos et hæredes noſtros arctius, per præſentes, dicto Domino noſtro Regi, et hæredibus ſuis de corpore ſuo immediatè vel mediatè deſcendentibus, qui de jure ad ſucceſſionem ipſius debent admitti; et in fide et fidelitate quibus eis tenemur, firmiter et fideliter promittimus,

"Quod ſi contingat dictum Dominum noſtrum Regem, filio aut *filiâ*, filiis aut filiabus legitimis de corpore ſuo non extantibus, vel *de corpore dicti Alexandri filii ſui*, diem ſuum extremum claudere in hac vita,

"Nos omnes et quilibet noſtrûm inclytam puellam Margaretam, filiam filiæ dicti Domini Regis, recipiemus, et prolem legitimam ex ea deſcendentem, in Dominam noſtram, et rectam hæredem Domini noſtri Regis Scotiæ." *Rymer*, t. 2. p. 266.

The proviſion in favour of the children "*de corpore dicti Alexandri filii*" has been owing to this circumſtance, that the parliament aſſembled juſt after the death of Prince Alexander, when it could not be known whether his widow, daughter of the Earl of Flanders, was pregnant.

The proviſion by which a daughter of Alexander III. yet to be born, is preferred to his grand-daughter by a daughter already dead, might have afforded an argument for Bruce in the competition with Baliol. It is ſtrange that it ſhould have eſcaped the attention of thoſe who, in our age, have contended for that ancient ſucceſſion with all the animoſities of the original competitors.

The only other obſervation which the claimant will make is this: How could the nobles of Scotland have uſed *hæredes ſui* to ſignify the King's *heirs-general*, if, in their own ſucceſſion, *hæredes ſui* meant *heirs-male*?

1. Alexander

1. Alexander de Cumin Comes de Buchan.
2. Johannes Comes de Athole.
3. Gilbertus Comes de Anegus [Angus].
4. Walterus Comes de Menetht [Menteth].
5. Rob. de Brus Comes de Carrick.
6. Duncanus Comes de *Fife* (*c*).
7. Willielmus Comes de Roſs.
8. Dovenaldus Comes de Marr.
9. Malcolmus Comes de Levenax [Lennox].
10. Malifius Comes de Strathern.
11. Magnus Comes de —aclin (*d*).
12. Patricius Comes de Dunbar.
13. Willielmus Comes Sothirland.

Here are no fewer than *thirteen* earls; and the claimant will prove, that all thoſe ancient territorial peerages had already deſcended, or did afterwards, in the courſe of ſucceſſion, deſcend, to heirs-general, and were enjoyed by heirs-general. From this number, however, the claimant muſt except three; the Earl of Marche, or de Dunbar, the Earl of Orkney, and the Earl of Strathern.

As to the *firſt*, it is known, that the earldom of March deſcended from father to ſon in the lineal courſe of ſucceſſion, till the forfeiture of the eleventh earl, in the reign of Robert III.

As to the *ſecond*, the Earl of Orkney, the claimant can ſay nothing with abſolute certainty, the notices of that family are ſo indiſtinct and imperfect. In 1284, there was a Magnus Earl of Orkney. In

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*c*) The title of this Earl is left blank by *Rymer*; certainly from an imperfection in the inſtrument. It ought to be ſupplied with the word *Fife*. It can refer to no other Earl. The Chriſtian name of the Earl of Fife at that time was *Duncan*.

(*d*) The imperfect word *—aclin* will not apply to any Earl known in the whole hiſtory and records of Scotland. *Rymer*, or rather his aſſociates, have read *aclin* for *aden*. The perſon here mentioned muſt have been *Magnus Comes Orcaden*. The Norwegian name *Magnus* greatly confirms this conjecture.

the

Introduction. the next century Maliſe Earl of Strathern appears with the addition of *Orkney* to his own title. The genealogical writers report, that this Maliſe Earl of Strathern married the heireſs of Orkney; and the fact is extremely probable; but as it is not authenticated beyond all exception, the claimant has no occaſion to urge it.

The *third* is Strathern. By this the claimant would not be underſtood to mean, that the title of *Strathern* did not afterwards deſcend to heirs-general; what ſhe means is, that the *old* earldom of Strathern fell to the crown by forfeiture, between 1330 and 1340, before the ſucceſſion had ever opened to heirs-general.

Let Marche then and Strathern be ſet aſide, as in them the ſucceſſion never opened to heirs-general; and Orkney, as there are only probabilities, and not full evidence, that it ever did. There remain ten earldoms in 1284; and if the claimant can ſhew, that *nine* of them had then deſcended, or did afterwards deſcend, to *heirs-general*, it would be ſingular indeed if the *tenth*, *Sutherland*, ſhould alone have been deſcendible to *heirs-male*.

The claimant now prays, that attention may be given to the particular examples which ſhe is to produce in her "hiſtory of the fate "of ancient territorial earldoms in Scotland."

SECT. I.

BUCHAN, before 1214.

Buchan, 1214. FERGUS Earl of Buchan left a daughter, Marjory (*a*), Counteſs of Buchan.

She made a grant to the church of the canons regular of St Andrew's, in the following terms: "*Margeria Comitiſſa de Buchan, &c.*

(*a*) She is ſometimes called *Margaret*; as will appear in the courſe of this ſection. Anciently there was much incorrectneſs in rendering the names of women into Latin: thus the ſame woman is called *Eva*, *Ela*, *Elena*.

Noveritis

" Noveritis nos, *et hæredes nostros de Buchan*, caritatis intuitu, teneri " ad solutionem Deo, et ecclesiæ Sancti Andreæ Apostoli, et canoni- " cis ibid. &c. dimid. marc. argenti annuatim de firma mea de In- " verine (*b*)." Buchan 1214.

This Countess Marjory became the wife of William Cumin: under the title of *Marjoria Cumin Comitissa de Buchan*, she confirmed certain grants to the church of St Andrew's (*c*).

William Cumin Earl of Buchan, with the consent and approbation of Marjory Countess of Buchan, made a grant to the same church of certain lands (*d*).

" Willielmus Cumyn Comes, et Margar. sponsa sua Comitissa de Buchan," made a grant of the church of Buthelny to the abbacy of Aberbrothock (*e*).

This William Cumin died in 1233 (*f*). His wife Countess Marjory

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*b*) *Chart. St Andrew's*, p. 379. This grant bears no date. Robert Prior of Lindores is a witness to it.

(*c*) " Marjoria Cumin Comitissa de Buchan — ecclesiam de Kennanchyn, cum decimis " et oblationibus, et terris, et cum omnibus eidem ecclesiæ justè pertinentibus; sicut carta " Merlesuani, filii Colbani, et confirmationes hæredum suorum, testantur." *Chart. St Andrew's*, p. 380.

" Marjoria Cumin Comitissa de Buchan — Kenmuck in Kennachhiusyre, &c. sicut car- " tæ Merlesuani, filii Colbani, et confirmationes hæredum suorum, eisdem canonicis, de " eadem terra factæ, testantur; salvo redditu et servitio quæ Merlesuanus, filius Walde- " ni, et hæredes sui, *mihi*, et hæredibus meis, debent, de prædicta terra." *Chart. St Andrew's*, p. 381.

(*d*) " Willielmus Cumin Comes de Buchan, &c. Sciatis nos, *ex consensu et assensu Mar-* " *geriæ Comitissæ de Buchan*, concessisse, &c. canonicis in ecclesia Beati Andreæ Apostoli, " &c. quandam terram, quæ dicitur Kenmukevech, in Rennothyr, &c. ita liberè, &c. " sicut carta Merlesuani, filii Colbani, et confirmationes hæredum suorum, dictis canoni- " cis, de prædicta terra, factæ, testantur et confirmant." *Chart. St Andrew's*, p. 378.

(*e*) *Chart. Aberbrothock*, vol. 1. fol. 190. *Willielmus de Bosco, Domini Regis cancellarius*, is a witness. The grant therefore could not have been made before 1211, when William de Bois became chancellor; *Chron. Melros*, p. 184. Neither could it have been made after 1221; for in that year it was confirmed by Alexander II.; *Ch. Aberbrothock*, vol. 1. fol. 81.

(*f*) " Obiit Wilhelmus Comes de Buthhan, abbatiæ de Der fundator." *Chr. Melros*, ad. an. 1233.

Buchan. 1214. ſurvived him; for in 1236, a controverſy reſpecting certain eſtates was adjuſted between her and the abbacy of Aberbrothock (*g*). She moreover confirmed a grant of a mark of ſilver made by her father *Fergus Comes de Buchan*, to the abbacy of Aberbrothock (*h*).

It is probable that ſhe did not long ſurvive; for *Alexander Comes de Buchan* appears as witneſs to a charter granted by Alexander II. *anno reg.* 26. *i. e.* 1240 (*i*).

That this Alexander Earl of Buchan was the ſon of Marjory Counteſs of Buchan, is demonſtratively certain from his confirmation of the foreſaid grant. It is tranſcribed in a note (*k*).

OB-

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*g*) *Chr. Aberbr.* vol. 1. fol. 10. " Anno gratiæ 1236, apud Ordobyſyn, 3tio die Au-
" guſti, ita ſopita fuit controverſia mota inter abbatem et conventum de Abirbrothoc ex
" una parte, et *M. Comitiſſam de Buchan, tunc in viduitatis ſuæ poteſtate exiſtentem*, ex al-
" tera; videlicet, Quod dictus abbas et conventus, pro ſe et ſucceſſoribus ſuis, quietam-
" clamaverunt prædictæ *Comitiſſæ, et hæredibus ſuis*, Brechulath, per diviſas ſubſcriptas;—
" dicta vero Comitiſſa, pro ſe et hæredibus ſuis, quietam-clamavit — totam terram de
" Ordbathbalth."

(*h*) The grant confirmed is in *Chart. Aberbroth.* vol. 1. fol. 63. It muſt have been before 1199; for *Hugo Cancellarius* is witneſs to the ratification of it by William the Lion. Now this Hugo [Roxburgh, Biſhop of Glaſgow] died in 1199; *Chr. Melros*, p. 181.

The confirmation by the Counteſs of Buchan runs thus. " Margareta Comitiſſa de
" Buchan, in legitima poteſtate viduitatis meæ;" confirms " donationem illam quam *Co-*
" *mes Fergus, pater meus*, eis fecit, in perpetuam elemoſynam, de una marca argenti annua-
" tim.—Quare volo et concedo, ut præfati monachi, præfatam marcam argenti, a prædicto
" Fergus patre meo eis conceſſam, de me et *hæredibus meis* annuatim,—percipiant et ha-
" beant, ita liberè et quietè, ſicut carta Domini patris mei ſuper hoc confecta teſtatur.
" Præterea concedo, et præſenti cartâ meâ confirmo, — licentiam firmandi ſtagnum ſuper
" terram meam de Fordun, ſine gravi læſione mei, et ſucceſſorum meorum." *Chart. Aberbroth*, vol. 1. fol. 81.

(*i*) 1ſt Auguſt, an. reg. 26. *Chart. Aberbrothock*, vol. 1. fol. 22.

(*k*) " Alexander Comes de Buchan" confirms " donationem illam quam Fergus Comes
" de Buchan, *avus meus*, fecit, in perpetuam elemoſynam, de una marca argenti eis, ad ter-
" minum Pentecoſtes annuatim ſolvendo; et etiam conceſſionem illam et confirmationem
" quam, bonæ memoriæ, *Margareta Comitiſſa de Buchan, mater mea*, in legitima poteſtate
" viduitatis ſuæ exiſtens, de prædicta marca, eiſdem fecit. Quare volo, et hac præſenti car-
" tâ meâ confirmo, ut præfati monachi, prædictam marcam argenti, a præfato *Fergus, avo*
" *meo*, eis conceſſam et collatam, et a *prædicta matre meâ*, ut dictum eſt, conceſſam et con-
" firmatam, de me, et hæredibus meis, percipiant et habeant, ita liberè et quietè, ſicut
" carta prædicti Fergus Comitis, et conceſſio et confirmatio *Marg. matris meæ*, ſuper hoc
" plenius teſtantur. Præterea concedo, et præſenti cartâ meâ confirmo, pro me, et hæredi-
" bus

OBJECTION.

Suppl. Caſe, p. 32. "Suppoſing that Marjory had been the wife of William Cumin, of which there is no evidence, ſhe may have been Counteſs in conſequence of Cumin's creation upon the extinction of the peerage in her perſon; for the deed ſays, *in legitima poteſtate viduitatis meæ:* or ſhe may have been created peereſs herſelf, to renew the extinct peerage; or ſhe may have been called ſpecially as an heir-female in the limitations of the peerage. This inſtance, like moſt of the others of Lady Eliſabeth's upon this head, is beyond the time of record; ſo that it becomes impoſſible for Sir Robert Gordon to point out the particular quality under which ſhe took the peerage." Buchan. 1214.

ANSWER.

In the claimant's original caſe, this ancient inſtance of Buchan had been briefly ſtated; but now it is cleared up beyond controverſy.

Sir Robert Gordon objects, That the deed formerly quoted was granted during her widowhood. The claimant now produces a deed granted by her as *Counteſs of Buchan*, and eſtabliſhing a rent-charge on her eſtate. In this deed there is no mention either of huſband or of widowhood; and therefore, were the objection good, as it is not, it would be foreign to the queſtion.

To ſuppoſe a creation of Cumin, is to ſuppoſe any thing which may ſerve an hypotheſis. The evidence produced ſhews, that Fergus ſtyled himſelf *Earl of Buchan*; that Marjory was his daughter and heir, and alſo ſtyled herſelf *Counteſs of Buchan*, in a deed wherein her huſband is not mentioned, as well as in deeds where he is; that Alexander her ſon was heir to his mother, and ſtyled himſelf *Earl of Buchan*.

The claimant apprehends, that the evidence of Marjory being *Counteſs*, is juſt the ſame as the evidence of her father Fergus, or her ſon Alexander, being *Earls*.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

"bus meis,—licentiam illam firmandi ſtagnum ſuper terram meam de Fordun, quam *præ-*
"*dicta mater mea*, in legitima poteſtate viduitatis ſuæ exiſtens, eiſdem confirmavit, ſicut
"carta ſua plenius teſtatur." *Chart. Aberbroth.* vol. 2. fol. 6.

It was neceſſary to treat thus fully of Marjory Counteſs of Buchan, becauſe Douglas, in his Peerage, by an unpardonable inadvertency, has confounded the genealogy of the family, has *created* a ſecond William Cumin *the ſon* of Counteſs Marjory, and has made Alexander Cumin *her grandſon*. It is remarkable, that the very evidence appealed to by Douglas carries his confutation along with it. His error is the more unpardonable, as Crawfurd, his predeceſſor in peerage-making, had truly, though briefly, ſtated the pedigree of the family.

That

Buchan. 1214. That William Cumin her huſband ſtyled himſelf *Earl of Buchan*, is no proof of a creation; for, in the ſequel, *this* will be ſhewn to have been the general practice in Scotland during many ages.

Sir Robert adds, that "Marjory may have been created a peereſs, or may "have been called ſpecially as an heir-female in the limitations of the peerage." It is left with Sir Robert to explain how thoſe preſumptions are conſiſtent with his own hypotheſis of the male nature of ancient earldoms. Of all ladies, why is this Counteſs Marjory to be the only exception? It is exceedingly unfortunate, that there ſhould be a neceſſity for this exception in the very firſt example of a *Counteſs* which is diſcoverable from authentic evidence in the Scottiſh hiſtory.

"It is beyond the time of record, and therefore Sir Robert can make no par-"ticular anſwer."

If by *record* Sir Robert means the *king's rolls*, he ſays true: but the claimant hopes, in the courſe of this inquiry, to ſhew, that many ancient facts relative to the hiſtory of Scotland may be aſcertained, to the conviction of every impartial and intelligent perſon, without the aſſiſtance of the *king's rolls*.

SECT. II.

ATHOLE, before 1231; 1242, 1269.

Athole. Before 1231; 1242, 1269. THE original erection of the ancient earldom of Athole is not extant. There is however evidence, that Malcolm Earl of Athole, and Henry Earl of Athole, his ſon, exiſted in the twelfth century (*a*).

This Henry had two daughters, Iſabel and Fernelith (*b*). Iſabel married Thomas de Gallovidia, brother of Allan Lord of Galloway; Fernelith, David de Haſtings (*c*).

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*a*) *Sir James Dalrymple's Collections*, *p.* 379. *Collection of original charters* in the Advocates library, Edinburgh, N° 60.

(*b*) There is ſome evidence that he had an elder daughter; however, as ſhe had no deſcendents, it is unneceſſary to embarraſs the genealogy with any inquiry concerning her.

(*c*) *Sir James Dalrymple's Hiſtorical Collections*, p. 379.; where, however, it muſt be obſerved, he has confounded Thomas with his ſon Patrick. — *Grant to the abbacy of Dunfermline* by "Thomas de Gallovidia, Comes Atholiæ, et *Iſobella Comitiſſa* ejus ſponſa;" *Chart. Dumfermline.* — "Anno 1231 obiit Thomas, frater Alani de Galweia, Comes de "Atholia;" *Fordun*, lib. 9. c. 48.

Patrick

Athole. Before 1231; 1242, 1269.

Patrick Earl of Athole, the son of Isabel and Thomas de Gallovidia, was burnt at Hadington in 1242, by the instigation, as was supposed, of Sir William Bisset (*d*).

On his death without issue, his aunt Fernelith succeeded; or, as it is expressed by an ancient historian, "David de Hastings *received* "*the earldom, accruing to him in right of his wife,* the aunt of the "murdered youth (*e*)."

This David de Hastings died at Tunis in the Croisade with Lewis IX. King of France, *anno* 1269 (*f*).

He left an only daughter, Adda, Countess of Athole, married to John de Strathbolgie (*g*).

The descendents of John de Strathbolgie and Countess Adda are well known in the history of England (*h*).

Their great-grandson David Earl of Athole, Constable of Scotland, after various changes of fortune, was attainted in the reign of Robert I. 1323, and slain at the battle of Kilblain, fighting under the banner of Edward Baliol in 1335 (*i*).

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*d*) *Fordun*, lib. 9. c. 59. *Andrew Winton*'s Chronicle, MS. Advocates library, Edinburgh.

(*e*) "Post cujus obitum David de Hastings *accepit ejus comitatum, provenientem sibi ex* "*parte uxoris suæ*, quæ erat matertera juvenis occisi." *Chron. Melros*, apud Gale, p. 206. —There is a grant to the abbacy of Coupar by Fernelith, "Comitissa Atholiæ, pro salute "animæ suæ, et pro anima Domini David de Hastings, quondam viri mei, Comitis Atho-"liæ."

(*f*) *Fordun*, lib. 10. c. 27.

(*g*) Confirmation by "Johannes Comes Atholiæ, et Adda Comitissa," of the lands of Inmith to the abbacy of Coupar, "quas David Comes Atholiæ, pater Addæ Comitissæ, de-"dit." 1283. *Sir James Balfour*, MS. Collections, Advocates library, Edinburgh. Among the Scottish Earls who became bound to acknowledge the Damsel of Norway as their sovereign, *Johannes Comes de Athole* appears. *Rymer*, t. 2. p. 266. an. 1283.

(*h*) They had great possessions in England; which, in a succession of ages, have dwindled away among heirs-portioners. *Dugdale*'s Baronage, t. 1. p. 685. & 686.

(*i*) "Per judicium in parliamento tento apud Cambuskynet, de consensu totius cleri "et populi editum." *Char. Dunfermline*, vol. 2. fol. 24. *Fordun*, lib. 13. c. 36.

OBJECTION.

Athole. Before 1231; 1242, 1269. p. 34. Sir Robert Gordon briefly and peremptorily remarks, "That the paſſage from Fordun [Chr. Melros] only ſhews, that David de Haſtings "got the *comitatus*, that is, the land-eſtate, through his wife; in conſequence of which, the crown has, as *it did in fifty other inſtances*, "conferred the peerage on the huſband."

ANSWER.

1. The hiſtorians of thoſe days had no idea of a *comitatus* diſtinct from, and independent of, a *Comes* or *Comitiſſa*. 2. Inſtead of talking at large of "the "crown in *fifty inſtances* conferring the peerage on the huſband who poſſeſſed "the land-eſtate through his wife," Sir Robert would have done better to have produced *one inſtance* where the crown did this, while peerages remained territorial. But this he has not done, and cannot do.

SECT. III.

ANGUS, before 1242.

Angus. 1242. THIS ancient earldom deſcended from father to ſon during many generations; at length, Malcolm Earl of Angus was ſucceeded in the earldom by his daughter Matildis Counteſs of Angus (*a*).

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*a*) In *the Chartulary of Aberbrothock*, vol. 1. fol. 52. 53. there occurs a grant in theſe words. "Univerſis Sanctæ Eccleſiæ filiis, *Matildis Comitiſſa de Angus* ſalutem. Sciant "præſentes et futuri, me, in legitima poteſtate viduitatis meæ exiſtentem, conceſſiſſe, et hac "chartâ meâ confirmâſſe, Deo, et eccleſiæ Sanctæ Thomæ Martyris de Aberbrothock, et "monachis ibidem Deo ſervientibus, et ſervituris, donationem illam quam Gillechriſt Co"mes de Angus, proavus meus, eis fecit; videlicet, de eccleſiis de *Monifod*, *Murrani*, "*Kerimor*, et *Strathectin*, tenend. et habend. ſicut cartæ predicti Gillechriſt, proavi mei, "et aliorum anteceſſorum meorum, eis inde collatæ, melius et plenius teſtantur."

This grant was originally made by *Gilchriſt Comes de Angus*, confirmed by his ſon Duncan in the reign of William I. and again confirmed by his grandſon Malcolm, the father of Counteſs Matildis; *Ch. Aberbroth.* vol. 1. fol. 28.

The ſame Counteſs confirmed other grants made by her predeceſſors; *ibid.* vol. 1. fol. 75.

She

She married, 1. John Cumin, who bore the title of *Comes de Angus* (*b*). 2. Gilbert de Umfraville (*c*), who died in 1245 (*d*). Angus. 1242.

She was ſucceeded by her ſon Gilbert, " who," to uſe the words of Lord Coke, " was Earl of Angus as heir to his mother (*e*)."

This Gilbert forfeited in the reign of Robert I. Although David II. conferred the earldom of Angus on Sir John Stewart of Bonkill, yet the title of Angus was poſſeſſed in England by the family of Umfraville for ſeveral generations (*f*).

OBJECTION.

p. 30. Sir Robert Gordon is pleaſed to ſay, " that this inſtance turns againſt " Lady Eliſabeth. For, 1. It is acknowledged, that Matildis was twice " married, and that both her huſbands were Earls of Angus; *ſo that* " *the peerage has plainly failed in her for want of heirs-male, before* " *her firſt marriage*. But ſhe took the family-eſtate; and, *in conſidera-* " *tion of that*, John Cumin was created Earl of Angus. That marriage " ended without iſſue-male; and, *in continuation of the ſame favour* " *to the family*, her ſecond huſband, Gilbert de Umfraville, was created " Earl of Angus alſo. Both of which creations communicated the title " of *Counteſs* to her.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*b*) " Obiit Johannes Cumin *Comes de Angus* in Francia." *Chron. de Melros*, ad. an. 1242.

(*c*) " Dominus Gillibertus de Humframwill accepit *Comitiſſam de Anegus* in uxorem." *Chron. de Melros*, ad an. 1243.

(*d*) 29 Henry III. *Dugdale*, Baronage, tom. 2. p. 505.

(*e*) *Coke*, 4 Inſt. p. 47. *Gilbertus de Umfravill Comes de Anegus* is one of the nobles who ſwear to ratify the marriage-contract of the Princeſs Margaret, daughter of Alexander III. *Rymer*, t. 2. p. 1082. an. 1281.—49 Henry III. Gilbert de Unfraville is called *Earl of Angus*; *Dugdale*, Baronage, t. 1. p. 505. Summoned to parliament 25 Edward I. by the title of *Earl of Angus*; *Dugdale*, ibid.

(*f*) *Dugdale*, ut ſupra. *Rymer*, paſſim.
It is remarkable that the Engliſh hiſtorians conſidered the Stewarts Earls of Angus as uſurpers of the right of the Umfravilles. Thus in *Scalæ Chronicon*, publiſhed by *Leland*, Collectanea, vol. 1. p. 565. 568. mention is made of " Thomas le Seneſcal, *that callit* " *hymſelf* Counte of Angus;" and of " Thomas Seneſchal, that *was named* in Scotland " Counte of Angoſe."

" 2. Lord

Angus. 1242.

" 2. Lord Coke appears to have been unacquainted with the rules of " ſucceſſion in ancient earldoms in Scotland, and *to have blended them* " *with the rules of ſucceſſion in a barony by tenure*, or by writ. In- " deed, the ſucceſſion of Gilbert to the Scottiſh titles and rights is not " the point under conſideration in this paſſage.

" 3. Matildis *may* have been created a peereſs, or *may* have been ſpe- " cially called in the limitation after the heir-male of the ſame degree, " *or* after the termination of all heirs-male whatever."

ANSWER.

It is ſingular, that Sir Robert Gordon ſhould draw an inference in favour of his hypotheſis from the circumſtance of both the huſbands of Matildis being termed *Earls of Angus*; a circumſtance which the claimant conſiders as a great confirmation of her argument. If creations of earls are to be *ſuppoſed*, and ſuch *ſuppoſitions* are to be uſed as a confutation of female ſucceſſion, Sir Robert will ſmooth his way over many a difficulty. In this particular inſtance, it happens, that the ſuppoſition is not only without evidence, but palpably erroneous.

In order to make way for the creation of John Cumin and Gilbert de Umfraville, Sir Robert obſerves, that " *the peerage has plainly failed in* Matildis *for* " *want of heirs-male, before her firſt marriage*;" i. e. that before 1242, all the male deſcendents of the firſt Earl of Angus, the predeceſſor of Matildis, had failed.

Now, the contrary is certain. For Alexander II. beſtowed the earldom of Caithneſs on Magnus, the ſon of Gilibrid Earl of Angus, and brother of Gilchriſt, great-grandfather of Matildis. *Sir James Dalrymple*'s Hiſtorical Collections, Pref. p. 73. *Chart. Aberbroth.* fol. 18.; and genealogiſts agree, that this family was ſubſiſting in the male line 1296, when John Earl of Caithneſs ſwore fealty to Edward I.

Gilchriſt, the great-grandfather of Matildis, had another brother, called *Gilbert*; *Crawfurd's Lives of the Officers of State, p.* 356. *From him almoſt the whole gentlemen of the name of* Ogilvie *are at this day deſcended in a line of males.* See the evidence of this in *Douglas*'s Peerage, p. 12. &c. *Ogilvie* Earl of *Airlie*.

Thus, 1. It is abſolutely impoſſible, that " the peerage had failed in Matildis " for want of heirs-male;" and conſequently neither ſhe nor her huſbands could have taken the title of *Angus*, ſuppoſing it limited to males.

2. The cenſure on Lord Coke for his ignorance is rather too peremptory, when there is ſo much evidence for proving that there was a ſtrong analogy between the ſucceſſion to ancient earldoms in Scotland, and the ſucceſſion in England to baronies by tenure.

3. The laſt ſuppoſition, That Matildis *may* have been created a peereſs, or *may* have been ſpecially called in certain imaginary limitations, has been already confuted; for if ſhe was not a Counteſs as *heir of line*, it is plain that the eldeſt male deſcendent of one or other of her great-granduncles, Magnus and Gilbert, muſt have been Earl as *heir-male*.

SECT.

SECT. IV.

MENTETH, 1257.

AN appoſite example of *female ſucceſſion in lands and dignities* occurs in the hiſtory of the earldom of Menteth. The circumſtances are ſo ſingular that they merit attention. Menteth. 1257

It appears, that in the thirteenth century, Walter Cumin married the Counteſs of Menteth: in conſequence of this marriage, the Chronicle of Melros repeatedly terms him, "W. Cumin, *called* Earl "of Menteth (*a*)."

In 1257 [according to Fordun's account], "Walter Comyn the "old Earl of Menteth died ſuddenly, being poiſoned by his wife, "as was reported. In 1258, the Counteſs of Menteth, [the widow "of Walter Comyn], diſdaining the addreſſes of the nobles who "ſought her in marriage, wedded John Ruſſel, an unknown Eng-"liſh knight. The nobles of Scotland, irritated at this, accuſed "her of the murder of the Earl, her former huſband, and impri-"ſoned both John Ruſſel and her (*b*). Meanwhile, Walter Bullok "(r. Balloch) arrogantly [*protervè*] claimed the entire earldom of "Menteth, in right of his wife, [*ex parte uxoris ſuæ*]; and, by the "favour of the nobles, obtained it. The Counteſs, [i. e. the elder

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*a*) "1255. Sed et V. [W.] Cumin, *dictus Comes de Meneteth*, cum cæteris magnati-"bus terræ, noluerunt apponere ſigilla ſua ad quoddam nefandiſſimum ſcriptum quod "prædicti conſpiratores fecerant"—1256. Cernentes igitur omnes majores natu Scotiæ, "quorum caput erat Walterus Cumin, *dictus* Comes de Maneteth," &c. *Chron. Melros*, apud Gale.

(*b*) "Eodem anno, 1258, Walterus Comyn, Comes veteranus de Menteth, veneno, "uxoris ſuæ, ut dicitur, repentinâ morte interiit. Et anno ſequenti Comitiſſa de Men-"teth, contemptis proceribus nobilibus qui eam ducere volebant, cuidam ignobili militi "Angligenæ, Johanni Ruſſel nomine, ſe nupſit. *Unde* magnates Scotiæ indignantes, "mortem *Comitis prioris* ei impoſuerunt; et tam ipſum Johannem, quam Comitiſſam, "vinculis mancipaverunt." *Fordun*, lib. 10. c. 11.

Menteth. 1257 " Counteſs], unable to endure the multiplied inſults of her adverſa-
" ries, on being ſet at liberty, and on receiving a ſum of money,
" diſgracefully departed from Scotland with her huſband Sir John
" Ruſſel (*c*)."

From this paſſage of Fordun, it is plain, that the widow of Walter Comyn was Counteſs of Menteth in her own right. The dignity of her ſuitors, their reſentment on being rejected, and the claim made by Walter Stewart *Balloch*, " ex parte uxoris ſuæ," all concur in eſtabliſhing this propoſition.

Who was this lady, the wife of Walter Stewart, and *what* was the nature of her claim, does not with certainty appear. It is probable, however, from evidence to be hereafter mentioned, that ſhe was the younger ſiſter of the widow of Walter Comyn. If the elder ſiſter was accuſed of poiſoning her huſband, and married a foreigner, without permiſſion from Alexander III. the judgement of the nobles, in favour of the younger ſiſter, was what the manners of a fierce and unlettered age might juſtify. Had the cauſe of the elder ſiſter been tried in milder times, and by judges more intelligent, the iſſue of the trial might have been different.

The elder Counteſs of Monteith did not acquieſce in the juſtice of this ſentence (*d*). " In 1260, ſhe diſpatched her proctors to the
" court

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*c*) " Interea Walterus Bullok, *ex parte uxoris ſuæ*, totum comitatum de Menteth
" protervè calumniatus eſt; quem favore magnatum adeptus eſt: ſed et Comitiſſa, tot ad-
" verſariorum inſultationes ſufferre non prævalens, libertati donata, et quâdam ſummâ pe-
" cuniæ acceptâ, de Scotia ignominiosè cum viro ſuo eſt profecta." *Fordun, ibid.*
It is proper to obſerve, that the perſon called by Fordun, and other of our hiſtorians, *Walter Bullok*, was certainly Walter Stewart, the fourth ſon of Walter of Dundonald, *the firſt Stewart*. See the *authorities* referred to in *Stewart's hiſtory of the Stewarts*, p. 48. The word *Bullok* is evidently an error of Saxon tranſcribers for *Balloch*, which muſt have ſounded uncouth to a Saxon ear. In the Gaelic language, *Bailloch*, pronounced as if *ai* were an open *a*, means *freckled*. It is a common mark of diſtinction.

(*d*) " Anno 1260 *Comitiſſa de Menteth*, nuncios ad Romanam curiam deſtinavit, con-
" querens de violentia ſibi illata, et de ſpoliatione *hæreditatis ſuæ*. Ad cujus requiſitio-
" nem

" court of Rome, complaining that ſhe had been injuriouſly treated, Menteth.1257
" and ſpoiled of her inheritance. At her requeſt there came after-
" wards to York one Pontius, nuncio from Pope Urban [IV.]. He
" had ſpecial powers from the Pope to inquire into the violence and
" injuries, which, as the Counteſs contended, ſhe had unjuſtly ſuf-
" fered. This legate cited the Lord Walter, occupier [or poſſeſſor]
" of the earldom of Menteth: He alſo cited the biſhops, abbots,
" and almoſt the whole nobility of Scotland, to give teſtimony in
" this cauſe. A citation to appear, and anſwer in judgement, with-
" out the limits of the kingdom, was contrary to the privileges
" of the King and kingdom of Scotland. Alexander conſidered
" ſuch citations as oppreſſive to himſelf, his kingdom, and ſubjects,
" and tending to ſet at nought his ancient rights in queſtions of
" that nature. Ready to determine the controverſy according to the
" laws of Scotland, he would no longer ſuffer himſelf and his king-
" dom to be thus unduly aggrieved: he therefore appealed from
" the Nuncio Pontius to the Pope; and ſo the matter remained un-
" decided."

Meanwhile Walter Stewart kept poſſeſſion of the title. Under that title, in 1262, he confirmed a grant of the church of Saint Colmanel in Kintyre, to the abbacy of Paiſley (*e*).

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

" nem poſtea venit quidam nuncius a latere Domini Papæ Urbani, miſſus in Angliam, a-
" pud Eboracum, Pontius nomine, ad inquiſitionem faciendam, ex ſpeciali mandato Do-
" mini Papæ, ſuper injuriis et moleſtiis eidem Comitiſſæ, ut dicebat, injuſtè illatis.— Qui
" quidem legatus citari fecit Dominum Walterum Bullok, dicti comitatûs occupatorem,
" epiſcopos etiam et abbates, ac proceres fermè totius Scotiæ, ad perhibendum de his te-
" ſtimonium veritati. Quod attemptatum fuit contra privilegium Regis et regni Scotiæ,
" ut aliquis extra proprios fines ad alicui reſpondendum vocaretur. Rex autem perpen-
" dens, non ſolum ſe, et regnum ſuum ac ſuos, ſuper his citationibus gravari, ſed et pri-
" vilegia ſua antiqua in hac parte adnullari, cum ipſe, ſecundum leges regni ſui, paratus
" eſſet hanc cauſam determinare, non ulterius ſe et regnum indebitè ſuſtinens gravari, con-
" tra dictum Pontium ad Summum Pontificem appellavit; et ſic ſub diſcuſſione lis adhuc
" pendet." *Fordun*, lib. 10. c. 14. The expreſſion, *lis adhuc pendet*, ſhews that Fordun had tranſcribed this paſſage from ſome chronicle compiled in the very age of Alexander III.

(*e*) He is therein ſtyled, *Walterus Seneſcallus, Comes de Menthet.* *Ch. Paſlet*, fol. 73.

This

Menteth. 1257 This queſtion as to the earldom did not receive a determination during the life of the elder Counteſs of Menteth. Fordun obſerves, that in 1273, "a great controverſy aroſe at York between John Co-"myn and Walter Bullok [Balloch], concerning the earldom of "Menteth; for that William, the ſon of this John Comyn, had "married the daughter of the former Counteſs, who was the true "heir (*f*)."

It is obvious, that this was an attempt to revive the controverſy which had been begun before the Pope's nuncio ſome years before. The family of Comyn probably expected, that their formidable influence might deter the King from oppoſing a trial without the limits of Scotland, where their intereſt was concerned. But nothing could ſhake the magnanimity of Alexander III.

The controverſy was not decided at York. Walter Stewart *Balloch* continued to retain the title of *Earl*, and his wife the title of *Counteſs, of Menteth.*

In the marriage-contract of the Princeſs Margaret, daughter of Alexander III. he is called *Walterus Comes de Meneteth* (*g*). Fordun ſays, "In 1281, the Princeſs Margaret paſſed over to Norway with "a ſplendid retinue, being accompanied *by the Earl Walter Balloch,* "*and his Counteſs, of Menteth.* Earl Walter and his ſpouſe returned "ſafely to Scotland (*h*)."

The controverſy as to the earldom of Menteth was finally decided in 1285, by Alexander III. in a parliament held at Scone. The

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*f*) "Magna lis orta eſt apud Eboracum, inter Johannem Comyn et Walterum Bul-"lok, pro *comitatu* de Menteth; eo quòd Willielmus, filius ipſius Johannis, deſponſave-"rat filiam *Comitiſſæ prioris, quæ fuit verè hæres.*" *Fordun*, lib. 10. c. 33.

(*g*) *Rymer*, t. 2. p. 1082.

(*h*) "Nobili transfretavit apparatu, *cum Waltero Bullok Comite, et ejus de Menteth Comi-"tiſſa.*—Walterus autem Comes, et uxor ejus, in Scotiam proſperè redierunt." *Fordun*, lib. 10. ch. 37. Had the guardians of the Lady Eliſabeth been to put words in Fordun's mouth, they could have employed none more exactly ſuiting their hypotheſis, that in ancient times a man in conſequence of his marrying a *Comitiſſa* aſſumed the title of *Comes.*

King

King divided the eſtate between William Comyn and Walter Stewart [Balloch], the earldom to remain with Walter Stewart, and one half of the lands to be erected into a barony in favour of William Comyn (*i*). Whether this deciſion was in conſequence of a compromiſe, or not? Whether it was juſt, or not? are queſtions of no moment to the preſent ſubject. Menteth. 1257

After this deciſion, Walter Stewart retained the title of *Earl of Menteth.* In the famous letter to Edward I. 1290, called *Litera communitatis Scotiæ*, he is named *Guater Conte de Meneteth* (*k*). In 1291, under the title of *Walterus Comes de Meneteth*, he was one of the *auditors* on the part of Robert Bruce (*l*). Under the ſame title, in 1294,

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*i*) *And. Winton*, Chronicle, an. 1285. MS. *Advocates library*, Edinburgh.

" Alexander the thride oure King,
" *Gart* mak at Scone greit gaddering,
" The ſaxtene day eftir Paſchę;
" Quhen thair the Statis gadderit was,
" William Cumyne, than *of lauthe*,
" The Lordis broder of Badyenauche,
" The Erle of Menteith than began
" Before the King to pleyd than.
" The King then of his counſaill
" Maid deliverance fynaill,
" That earldom to be delt in twa
" Partis, and the tane of tha
" With *themis* aſſignit he
" Till Walter Stewart; the *laif* to be
" Maid als gude with all proffit
" Schir William Cumyne till have quyt
" *Till* hald it in fre barony,
" *Beſyde the erldome* al quytly."

The word *themys* implies the clauſe *cum bondis et nativis*; all the *ſerfs* on the eſtate were adjudged to Walter Stewart. See *Gloſſary* ſubjoined to *Twiſden's Collection*, voc. *Theme*. The expreſſion *of lauthe*, means " of right," or " by law;" *gart*, " cauſed;" *laif*, " remainder;" *tane*, " one half;" *till*, " to;" all the reſt will be intelligible to an Engliſh reader. — Sir Robert Gordon has treated one of the claimant's authorities with great ſcorn, becauſe taken from an *Old Chronicle*; he will certainly give no better quarter to this authority, becauſe taken from a dull and verboſe piece of Scottiſh doggrel verſe of the fourteenth century. Should the guardians of the claimant quote the *Old Chronicle* of Melros for its pure Latinity, or the *Chronicle of Andrew Winton* for elegance of verſification, they would merit cenſure; but when they quote old and obſolete authors, in proof of facts to which old and obſolete authors alone can bear witneſs, they ought not to be cenſured. They trace facts and cuſtoms to their ſource; others may ſatisfy themſelves with fanciful theories, *deduced from the nature of the thing.*

(*k*) *Rymer*, t. 2. p. 471.

(*l*) Ditto, t. 2. p. 552.

Menteth.1257 Edward I. addreſſed a letter to him (*m*). He bore the title until the year 1298, when Edward I. put him to death.

For ſeveral generations, the earldom of Menteth remained with the deſcendents of Walter Stewart *Balloch* and his Counteſs. At length, Margaret Counteſs of Menteth married Robert Stewart, ſecond ſon of Robert II. and afterwards Duke of Albany. Their ſon Murdoch forfeited in 1425, and thus the earldom devolved on the crown.

SECT. V.

CARRICK, 1270.

Carrick.1270. CARRICK had its Earls of old (*a*). Duncan, of the family of the Lords of Galloway, was the firſt Earl of Carrick, and founder of the abbacy of Croſs-regal (*b*).

Adam de Kilconcath, *Comes de Carrick*, engaged in a cruſade 1267 (*c*). He died in the Holy Land 1270.

His only daughter and heir, *Counteſs of Carrick*, married Robert Bruce, ſon of the Lord of Annandale and Cleveland, *Earl of Carrick in her right*, and by her the father of Robert Bruce, King of Scotland (*d*).

The

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*m*) *Rymer*, t. 2. p. 644.

(*a*) "Olim Carricta ſuos habuit Comites." *Camden*. Britannia, *voc.* Carricta.

(*b*) *Sir James Dalrymple*'s Hiſtorical Collections, p. 186.

(*c*) *Fordun*, l. 10. c. 24. p. 109. new edition.

(*d*) "Adam Comes de Carrick in Terram Sanctam pro Chriſto peregrinaturus, ibidem "moritur, relinquens unicam filiam hæredem, nomine Martham, *quæ ſibi in comitatum* "*ſucceſſit*. Quæ dum unâ dierum, cum ſuis armigeris et domicillis ancillis, quo ſibi pla- "cuerat, venatum pergeret, egregio militi, juveni ſpecioſiſſimo, trans eadem equitanti "rura,

The huſband of this Counteſs of Carrick, under the title of "Robert de Brus Comes de Carrick," was one of the Scottiſh nobles who became bound to acknowledge Margaret, the Damſel of Norway, Carrick 1270.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

"rura, Roberto de Bruce nomine, filio Roberti de Bruce, cognomine *Nobilis*, Dominî "Vallis de Annandia in Scotia, et de Cleveland in Anglia, obviavit: quæ quidem, peractis "hinc inde ſalutationibus, velut curialium moris eſt, et oſculis, ipſum venandi gratiâ ſpa- "tiandique manere ſupplicat: ſed et illius quodammodo renuentis habenas, vi quâdam, "ſi dicere fas eſt, proȝ manu retraxit; et ſecum militem, quamvis minimè volentem, "verſus Turnbiri ducebat ſuum caſtrum: ibique ſpatio dierum quindecim vel amplius "cum ſuis perhendinans, *Comitiſſam* clandeſtinè, benevolis etiam et amborum amicis in- "ſciis, uxorem duxit, regio ſuper hoc conſenſu nullatenus procurato; quapropter to- "tius regni vulgaris fuit aſſertio, quod ipſum juvenem quaſi vi rapuerat in maritum. "Quod ut regis Alexandri [III.] pervenit ad aures, caſtrum cepit de Turnbiri, ac omnes "terras et poſſeſſiones illius in ſuis manibus fecit recognoſci; eo quod, inconſultâ Maje- "ſtate Regiâ, cum Domino de Bruce ſe maritare præſumpſit. Intervenientibus tandem "amicorum precibus, et pactâ pecuniæ quâdam ſummâ, Regis animum æquiorem et be- "nevolum invenit, ac etiam totum dominium idem Robertus obtinebat: ex qua, divinâ "providentiâ, filium genuit, cui nomen patris ejus impoſitum eſt, Robertus; cujus pater "fuit iſte Robertus, *Comes de Carrick ex parte uxoris.*" *Fordun*, lib. 10. c. 29.

In the additions to Fordun, drawn up in the reign of *James* II. it is ſaid, "Secundam "filiam Comitis David, fratris Regis Willelmi, nomine Iſabellam, Dom. Robertus de "Bruce duxit in uxorem; de qua genuit unum filium, nomine Robertum; qui genuit "Robertum *Comitem de Carric ex parte uxoris ſuæ*; et ille Robertum Regem." *Fordun*, lib. 11. c. 13.

To the ſame purpoſe ſpeaks Andrew Winton, who lived in the reign of Robert III. c. 139. MS. Advocates Library.

"This Robertis ſone eftirwart
"Gat ane ſon, was callit *Robert*
"*The Bruce*; the quhilk in his dayis
"*Weddit of Carrick the Counteſs*;
"*Sa was he Erle*, and Lord haill
"*Of Carrick*, and of Annanderdaill."

Thus alſo Chalmers of Ormond, a Lord of Seſſion in the reign of Queen Mary, *Origine des Ecoſſois*, p. 153. "Robert Bruce, fils de Robert Bruce Seigneur d'Annandale, *eut le* "*Conté de Carrick à raiſon de ſa femme*, fille unique de ce Comte trepaſſé en la Terre "Sainte."

Fordun calls this lady *Martha*; whereas the record to be hereafter mentioned calls her *Margareta*. The difference ariſes from the inattention of tranſcribers: *Marta*, a contraction for *Margareta*, was naturally miſtaken for *Martha*.

The Chronicle of Melros, an ancient and venerable authority, differs from Fordun; it ſays, "1270 obiit Adam de Kilconcath, Comes de Karryc, in Acconia; cujus *uxorem*, "*Comitiſſam de Karryc*, poſtea junior Rob. de Bruys accepit ſibi in ſponſam;" *Chron. de Melros*, p. 242. apud Th. Gale. — There ſeems indeed ſome reaſon to ſuppoſe, that this Counteſs of Carrick was the widow, not the daughter, of Adam de Kilconcath; and that her firſt huſband, as well as her ſecond, was Earl of Carrick in her right. For, 1. If Adam

Carrick. 1270. way, as heir of the kingdom of Scotland, 5th February 1283-4, and who ſigned the *Litera communitatis Scotiæ* in 1290 (*e*).

In 1292, under the title of "Robertus de Brus Comes de Carrick," he addreſſed himſelf to John Baliol, King of Scotland, in manner following.

"Whereas we have granted, reſigned, and quit-claimed for ever, "unto Robert de Brus, our ſon and heir, the whole earldom of Car- "rick, with its pertinents; and alſo all the other lands which at a- "ny time we have held in Scotland, or ought to have held, *by rea- "ſon of Margaret, late Counteſs of Carrick*, our ſpouſe, the mother of "the ſaid Robert, as *the right and inheritance* of the ſaid Robert our "ſon and heir:"

He therefore prayed the King "to receive the homage of the ſaid "Robert, as true and lawful lord of the earldom aforeſaid (*f*)."

Robert Bruce the ſon preſented this petition to Baliol, in his par-
1293 liament held at Stirling in Auguſt ~~1263~~; and he prayed the King to receive his homage.

It was conſidered, as appears from the record, that Robert Bruce, Earl of Carrick, ought to have reſigned the earldom directly in the

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

dam had been Earl in his own right, he would have been termed by the family-diſtinction, *de Galloweia*, rather than *de Kilconcath*. 2. The rape of Robert Bruce reſembles rather the exploit of a widow than of a virgin. This hypotheſis is, if poſſible, more favourable to the claimant's plea than the other; for, according to it, *Adam de Kilconcath, Earl of Carrick*, is an additional example of one being termed *Earl* in right of his wife.

(*e*) *Rymer*, t. 2. p. 266. 471.

(*f*) "Quia nos Roberto de Brus, filio et hæredi noſtro, *totum comitatum de Carrick*, "cum pertinentiis ſuis, et etiam omnes alias terras quas in Scotia aliquo tempore tenui- "mus, ſeu tenere debuimus, *ratione Margaretæ, quondam Comitiſſæ de Carrick*, ſponſæ no- "ſtræ, matris ejuſdem Roberti, *tanquam jus et hæreditatem* ejuſdem Roberti, filii et hære- "dis noſtri, conceſſimus et reſignavimus, et quieta-clamavimus in perpetuum:

"Veſtram Celſitudinem affectuosè per præſentes requirimus et rogamus, quatenus ho- "magium prædicti Roberti, filii et hæredis noſtri, *tanquam veri et legitimi Domini præ- "dicti comitatûs*, benignè admittere dignemini." *Rymer*, t. 2. p. 614.—It may be obſerved by the way, that according to Sir Robert Gordon's method of interpreting charter Latin, this paſſage ought to be tranſlated, "as right and lawful *laird* of the foreſaid *earl- "dom*,"

hands

hands of the Sovereign, the ſon became bound to procure ſuch reſignation, and at the ſame time reſigned whatever ſeiſin he himſelf had. Carrick. 1270

The ſheriff of Air was appointed to take ſeiſin of the earldom for the King, and to *extend* the lands, i. e. to eſtimate and report their yearly value.

Robert Bruce, the ſon, was appointed to bring a certificate from the ſheriff, that the King was in peaceable poſſeſſion of the earldom, in order to his being received to do homage (*g*).

Robert Bruce, the huſband of the Counteſs of Carrick, retired to England after the battle of Dunbar 1296 (*h*), and died there in 1303 (*i*).

So late as 1296, Edward I. gave him his old appellation of *Comes de Carrick* (*k*). Nevertheleſs Robert the ſon (afterwards King) bore the title of *Earl of Carrick* during his father's lifetime.

In the year 1296, 24° Edward I. the father and the ſon ſwore fealty to Edward I. They are ſtyled in the record, "Robert de "Brus le veil, 'e *Robert de Brus le jeouene Counte de Carrik* (*l*)."

1299, Robert Bruce the younger, in conjunction with the Biſhop of St Andrew's, and John Comyn, addreſſed the famous letter to Edward I. "wiſhing him health, and the ſpirit of charity towards "his neighbour." In this letter he ſtyles himſelf "*Robert Bruce, Earl*

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*g*) *Rymer*, t. 2. p. 614. 615. There was a ſeparate reaſon for ſeiſing the earldom in the hands of the ſovereign: Robert Bruce was born in 1274, *Fordun*, lib. 10. c. 34.; and conſequently had not come of age in 1293.

(*h*) *Fordun*, lib. 11. c. 25. This is confirmed by *Knyghton*, p. 2514.; where, after having mentioned the oath taken by Robert Bruce junior to the Biſhop of Carliſle, and his pretext for violating it, he adds, "Pater ipſius in auſtralibus partibus Angliæ moram "faciebat, hujus fraudis neſcius;" an. 1297.

(*i*) *Dugdale*, Baronage, vol. 2. p. 450.

(*k*) *Rymer*, t. 2. p. 714. 12th May 1296.

(*l*) *Pryne*, vol. 3. p. 653. *Knyghton*, p. 2482. edit. *Twiſden*.

Carrick. 1270 " *of Carrick*, one of the guardians of Scotland, appointed by the com-
" munity of Scotland, in the name of *John King of Scotland* (*m*)."

It would ſeem, that in England, both the father and the ſon were uſually ſtyled *Earls of Carrick*, and that the ſon was diſtinguiſhed by the addition of *junior*; for in 1297, Knyghton ſtyles him *the younger Earl of Carrick* (*n*).

OBJECTION.

This example, of a *Counteſs of Carrick*, and of her ſon Robert Bruce *Earl of Carrick* in her right, is utterly inconſiſtent with the hypotheſis of Sir Robert Gordon; and therefore it is not ſtrange that he ſhould have laboured much to elude it.

P. 31. 34. He obſerves, " That the peerage muſt have become extinct in the per-
" ſon of Margaret, through want of heirs-male, and been revived in
" the perſon of her huſband Robert Bruce. For that,

" 1. In 1293, Robert Bruce the father is called *Comes de Carrick*. Rymer, vol. 2. p. 614.

" 2. In a letter from Edward I. *anno* 1294, to Robert Bruce the
" ſon, Robert the father ſtill had the peerage; for *that* letter is directed
" to the ſon under theſe words, " Roberto de Brus Domino de Valle
" Annandiæ. Rymer, vol. 2. p. 643.

" 3. In a warrant from Edward I. 1296, Robert the father is ſtyled
" *Earl of Carrick*; yet, even in 1293, the wife of Robert was dead. Rymer, vol. 2. p. 614.

" 4. Afterwards Robert the ſon was Earl of Carrick upon his father's
" death; *which ſhews plainly, that he took the peerage through his fa-*
" *ther, and not through his mother.*

" 5. Fordun means nothing by *comitatus*, but the land-eſtate; and
" the reſignation by Robert the father, of the *comitatus*, means nothing

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*m*) " Willielmus Sancti Andreæ Epiſcopus, *Robertus de Brus Comes de Carrick*, et Jo-
" hannes Comyn filius, cuſtodes regni Scotiæ, nomine Præclari Principis Domini Johannis,
" Dei gratiâ, Regis Scotiæ Illuſtris, per communitatem ejuſdem regni conſtituti, ac ejuſ-
" dem regni ipſa communitas, *caritatis ſpiritum erga proximum, cum ſalute.*" Nov. 1299. *Rymer*, t. 2. p. 859.

(*n*) " Carliolenſis Epiſcopus, et cæteri qui cum eo erant in præſidio, civitatis ejuſdem et
" caſtri timentes de infelicitate, et inconſtantia *Roberti de Bruys junioris Comitis de Karyk.*" *Knyghton*, p. 2514. an. 1297. erroneouſly printed in *Twiſden* 1290.

" but

" but a resignation of the estate; seeing that, notwithstanding such re- Carrick. 1270
" signation, he still continued to possess the peerage."

ANSWER.

All this, however confidently urged, admits of an easy solution.

1. As to the *first* objection, That " Robert the father was styled *Earl of Car-*
" *rick* in 1293;" so far from impinging upon the claimant's argument, it is one of the many instances, that, in ancient times, he who possessed a *comitatus* in right of his wife, was termed *Comes*.

2. As to the *second* objection, it is founded on a gross error; for that the " *Robertus de Brus, Dominus de Valle Annandiæ*," mentioned in the letter 1294, is not Robert the son of the Countess of Carrick, and afterwards King of Scotland, but his *grandfather*, Robert Lord Annandale, competitor with Baliol. Indeed it requires not much critical knowledge in antiquity to discover, that Edward I. would not summon to the wars in Gascogny, a *minor*, as Robert, afterwards King, then was; and one whose grandfather and father were both alive. The former did not die till 1295, *Tyrrel*, vol. 3. p. 91.; the latter not till 1303, *Dugdale*, Baronage, vol. 2. p. 450.

3. As to the *third* objection, Although, in 1296, Edward I. gave the title of *Comes de Carrick* to the husband of the Countess of Carrick, yet he himself took no other title but that of *Robert Bruce the elder*; whereas the son of the Countess of Carrick took the title of *Robert Bruce, the younger Earl of Carrick*, in 1296; and of *Earl of Carrick* simply in 1299, and *this* during the lifetime of his father, who had resigned the *comitatus*.

4. That Robert the son was Earl of Carrick only upon his father's death, has been proved to be a mistake in history.

5. That " Fordun meant nothing by *comitatus*, but the land-estate," is an error two ways. 1. It supposes that Fordun did hold, that the *comitatus*, and the title of *Comes*, might be separated. 2. It supposes, that Fordun did not term Margaret of Carrick *Countess* before her marriage; whereas he expressly says, " *Comitissam* uxorem duxit." And the authority of Andrew Winton is equally express:

" Weddit of Carrick the *Countess*,
" *Sa* was he Erle."

The same observation applies to the resignation of the *comitatus* in 1292.

SECT. VI.

FYFE, between 1350 *and* 1359.

THE earldom of Fyfe descended in the direct line of succession from Macduff, who restored Malcolm III. to Duncan, 13th Earl of Fyfe, Fyfe. Between 1350 and 1359.

Fyfe. Between 1350 and 1359.

Fyfe, who was made prisoner with David II. at the battle of Durham in 1346 (*a*).

This Earl Duncan died without issue-male (*b*).

He was succeeded in the earldom by his only daughter Isabel. She married, 1. Sir William Ramsay, who is styled *Earl of Fyfe* about 1359 (*c*). 2. Sir Thomas Bisset. David II. granted the *comitatus de Fyfe* to Sir Thomas Bisset, and the heirs-male to be procreated between him and Isabella de Fyfe; whom failing, to return to the King and his heirs (*d*). As she herself represents the case, she resigned the earldom *through force and fear*. She married, 3. Walter Stewart, the son of Robert Stewart, Earl of Menteth, who was the son of Robert II. and afterwards Duke of Albany (*e*). She had no issue by any of her husbands.

In 1371, under the title of *Isabel Countess of Fyfe*, she entered into an indenture with Robert Earl of Menteth; wherein "the said "Countess doth acknowledge the said Earl to be her lawful heir-"*apparent*, as well by the tailzie made by umquhile Duncan Earl

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*a*) As to the genealogy of the family, see all the writers concerning old families. *Fordun*, lib. 14. c. 3. *Rymer*, t. 5. p. 671.

(*b*) The precise time of his death is not known. He was alive in 1350. *Rymer*, t. 5. p. 671. He was certainly dead in 1359; see the following note (*c*).

(*c*) *Original charter*, by David II. 20th August, anno regni 29. to which *Willielmus de Ramsay Comes de Fyfe* is a witness. *Sir Robert Sibbald*'s History of Fife, p. 97.

(*d*) "Dilecto et fideli nostro Thomæ Bisset, Militi, tenend. et habend. eidem Thomæ, "et hæredibus suis masculis inter ipsum et Isabellam de Fyff legitimè procreandis, de no-"bis, &c. Quibus hæredibus masculis inter dictos Thomam et Isabellam fortè deficienti-"bus, volumus quod totus prædictus comitatus, cum pertinen. ad nos, et hæredes nostros, "liberè revertatur." *Records* Charters, b. 1. N° 62. This favourite of David II. must have died early; for there is no further mention made of him either in history or record.

(*e*) It is a received opinion among all our writers, that this Walter Stewart was the elder brother of the Duke of Albany, not his son; and that the Countess of Fife was his widow when she married Sir Thomas Bisset. This, however, is irreconcileable with the tenor of the indenture 1371, as quoted in the text from Sir Robert Sibbald: The Countess expressly says, that her deceased husband was the *son* of Robert Earl of Menteth [Duke of Albany]. It is impossible that she could be mistaken in that particular.—The tenor of the indenture shews, that Walter Stewart was married to Countess Isabel after the death of Bisset.

"of

" of Fyfe her father, to Allan Earl of Menteth, grandfather of the " Lady Margaret, ſpouſe of the ſaid Robert, now Earl, as by the " tailzie made by the ſaid Iſabel herſelf, and her umquhile huſband " *Walter Stewart, the ſon of the ſaid Robert Earl of Menteth,* to the " foreſaid Earl; by which, upon the ſaid Earl's aſſiſting her in the " recovery of her earldom, *which ſhe had by force and fear otherwiſe* " *reſigned;* and that when the ſaid earldom is recovered, and the " Counteſs has got poſſeſſion of it, ſhe ſhall preſently reſign it in " the King's hands to infeft the Earl himſelf in it," &c. (*f*). Fyſe. Between 1350 and 1359.

Robert Earl of Menteth did accordingly ſucceed to the earldom, and was conſtantly named, " Earl of Fyfe and Menteth." Even after he became Duke of Albany, he continued to uſe the title of *Fyfe* (*g*).

His ſon Murdoch bore the ſame title (*h*). Upon his forfeiture, in the reign of James I. the earldom was annexed to the crown.

OBJECTION.

The objection to this inſtance is not perfectly intelligible. It is the p. 35. objection of one determined to ſupport an hypotheſis. It is ſaid, " That " the probability is, that this lady was not a peereſs in her own right, " but had the deſignation of *Counteſs of Fyfe*, as the widow of ſome " perſon who had got a creation of that dignity, which Biſſet after- " wards might have got ſome time after 1366."

ANSWER.

This is indeed running objections to the dregs. By ſuch *probabilities*, every argument may be anſwered. The whole tranſaction with the Earl of Menteth is e-

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*f*) Indenture 30th March 1371, recited in *Sir Robert Sibbald*'s Hiſtory of Fife, p. 97. the word *apparent* is vitiouſly uſed inſtead of *preſumptive*. The expreſſion, *which ſhe had by force and fear otherwiſe provided*, evidently relates to the reſignation, which enabled David II. to make ſo limited a grant of the earldom of Fife, as to exclude the heirs-male and heirs-general of the ancient Earls, and even Iſabel's own heirs of any ſubſequent marriage.

(*g*) *Anderſon*, Diplomata, N° 57. 61. 62.

(*h*) *Rymer*, paſſim; and *Anderſon*, Diplomata, N° 64.

 vidently

Fyfe. Between 1350 and 1359.

vidently inconſiſtent with Sir Robert's hypotheſis. Upon the ſuppoſition that the title of *Fyfe* had ſtood limited to heirs-male, neither Iſabel, nor any of her huſbands, could have pretended to a creation. The title would have belonged to the heir-male; and *he* was of the family of Wemyſs, deſcended from Gillimichael, fourth Earl of Fyfe (*i*).

SECT. VII.

ROSS, about 1375.

Roſs. About 1375.

THERE is no evidence of the erection of this ancient earldom. It is certain, however, that it was enjoyed in the twelfth century by Malcolm Earl of Roſs (*a*).

The ſucceſſion was carried down in the direct male line to Hugh Earl of Roſs, in the reign of David II. This Hugh had two ſons, William, and Hugh Roſs of Rarichies.

William Earl of Roſs, upon his own reſignation in parliament, obtained a charter from David II. of the earldom of Roſs, and lordſhip of Sky, "to the ſaid Earl, and the heirs-male of his body "lawfully to be procreated; whom failing, to Sir Walter Leſley, "and Euphemia his wife, and the longeſt liver, and to the heirs "lawfully procreated, or to be procreated, of Euphemia; with this "proviſion, That if there be no male iſſue of Euphemia's body, and "ſhe have more than one daughter, then the eldeſt daughter of Euphemia, or of her heirs, on failure of the heirs-male, ſhould "have right to the whole earldom, lordſhips, and lands, without diviſion; and failing Sir Walter, Euphemia, and the heirs of "her body, the earldom, &c. is provided to Johanna, the younger

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*i*) See the authorities for this quoted by *Douglas*, Peerage, *tit.* Wemyſs Earl of Wemyſs.

(*a*) *Chartulary of Dunfermline*, fol. 186.

"daughter

" daughter of Earl William, and to her heirs; and in caſe thoſe " heirs be females, it is provided, that the eldeſt heir-female ſuc- " ceed without diviſion (*b*)." Roſs. About 1375.

William Earl of Roſs died without iſſue-male. He was ſucceeded in his eſtate and dignity by his daughter Euphame: her huſband, Walter Leſley, bore the title of *Earl of Roſs* (*c*).

Euphame had by her huſband Walter a ſon Alexander, afterwards

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*b*) *Record, Charters*, b. 1. N° 258. 23d October 1370. " David, Dei gratiâ, Rex " Scotorum, omnibus probis hominibus totius terræ ſuæ ſalutem. Sciatis nos dediſſe, " conceſſiſſe, et hac preſenti cartâ noſtrâ confirmaſſe, dilecto conſanguineo noſtro Williel- " mo Comiti de Roſſe, totum comitatum de Roſſe, et dominium de Sky, ac omnia alia " dominia, et terras, cum pertinen. quæ fuerunt ipſius Comitis ubicunque infra regnum; " exceptis dominiis illis, et terris, quæ fuerunt dicti Comitis, infra vicecomitatum de A- " berdene, de Dumfries, et de Wigtoun. Quem quidem comitatum, terras, et dominia, " cum pertinen. idem Comes, non vi aut metu ductus, nec errore lapſus, ſed merâ et ſpon- " taneâ voluntate ſuâ, nobis, apud Perth, in pleno parliamento noſtro tento ibidem, viceſi- " mo tertio die menſis Octobris, anno Domini milleſimo trecenteſimo ſeptuageſimo, in " preſentia Roberti, Seneſcalli Scotiæ, Comitis de Stratherne, nepotis noſtri, Willielmi " Comitis de Douglas, Georgii Comitis Marchiæ, &c. et aliorum plurium baronum et " nobilium regni noſtri, *per ſuas literas patentes, &c.* reſignavit, ac totum jus et clameum " quæ in dictis comitatu, dominiis, et terris, habuit, vel habere potuit, in futurum, pro " ſe et hæredibus ſuis, omnino quietum-clamavit in perpetuum: Tenend. et habend. dicto " Comiti, et hæredibus ſuis maſculis de corpore ſuo legitimè procreand.; quibus deficien- " tibus, Waltero de Leſley, Militi, et Euphamiæ ſponſæ ſuæ, ac eorum alteri diutius vi- " venti, et hæredibus de ipſa Euphamia legitimè procreatis, ſeu procreand; ita, viz. " quod ſi hæres maſculus de ipſa Euphamia non exierit, et plures fortè de ſe habuerit filias, " ſenior ſemper filia, tam ipſius Euphamiæ, quam ſuorum hæredum de ſe exeuntium, de- " ficientibus hæredibus maſculis, habeat tantum jus et integrum dictum comitatum, domi- " nia, et terras, cum pertinen. exceptis ſupra exceptis, ſine diviſione aliquali; et ipſis " Waltero et Euphamiâ ſponſâ ſuâ, et hæredibus de ipſa Euphamia legitimè procreand. " fortaſſe deficientibus, Joanna, junior filia dicti Comitis, et hæredes ſui, et quando ipſi " hæredes femellæ fuerint, ſemper ſenior *hæres femella*, ſine diviſione et participatione ali- " qua, totum et integrum dictum comitatum, dominia, et terras prædictas, cum pertinen. " exceptis ſupra exceptis, teneat et teneant, de nobis, et hæredibus noſtris, in feodo et hæ- " reditate, &c. adeo liberè et quietè in omnibus, et per omnia, ſicut dictus Willielmus Co- " mes de Roſs, conſanguineus noſter, vel aliquis prædeceſſorum ſuorum, dictum comita- " tum, dominia, et terras prædictas, cum pertinen. aliquo tempore liberiùs, quietiùs, et " honorificentiùs, juſtè tenuit ſeu poſſedit, faciendo inde ſervitia debita et conſueta. In cu- " jus rei teſtimonium, &c. teſtibus, &c. apud Perth, vigeſimo tertio die Octobris, anno " regni noſtro quadrageſimo primo."—This charter is remarkable on many accounts; and eſpecially for this, that it proves *hæredes* to have meant *heirs-general* in the 14th century: *Quando ipſæ hæredes femellæ fuerint.*

(*c*) *Rymer*, t. 2. p. 215. an. 1379.

Earl

Roſs. About 1375. Earl of Roſs, and a daughter Margaret, married to Donald, Lord of the Iſles (*d*).

After the death of Walter Leſley, Euphame married Alexander Stewart, Earl of Buchan, a younger ſon of Robert II. Some miſunderſtandings aroſe between her and her huſband; their diſputes were terminated by a judgement which their ordinaries, the Biſhops of Roſs and Murray, pronounced, 1389 (*e*). In this judgement the wife is called *Euphemia Comitiſſa de Roſs*, the huſband *Alexander Seneſcalli Comes de Buchan, et Dominus de Roſs*. It is impoſſible that ſhe could have been called *Comitiſſa de Roſs*, inſtead of *Comitiſſa de Buchan*, had ſhe not been Counteſs in her own right.

Euphame Counteſs of Roſs was ſucceeded in her eſtate and dignity by Alexander Leſley her ſon. He married a daughter of Robert

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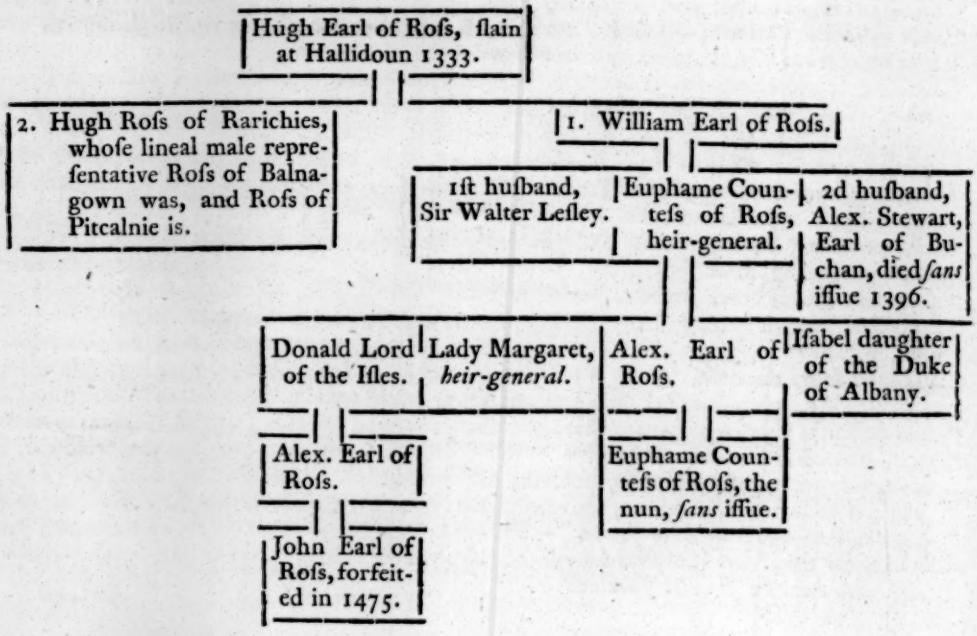
PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*d*) *Fordun*, l. 15. c. 21. *Boec.* Hiſt. Scot. l. 16. fol. 341. edit. Paris 1574.—The pedigree of the family of Roſs will be more fully underſtood from the following table.



(*e*) *Chart. Morav.* vol. 1. fol. 101.

Duke

Duke of Albany. By her he had an only child, a daughter, Euphame Counteſs of Roſs. She became a nun, and reſigned the earldom of Roſs in favour of her uncle John Earl of Buchan, ſon of the Duke of Albany, and the heirs-male of his body; whom failing, to return to the crown (*f*). Roſs. About 1375.

Donald Lord of the Iſles, in right of his wife, the heir-general of Euphame the nun, aſſerted his right to the earldom: in ſome meaſure he took poſſeſſion; for the Continuator of Fordun obſerves, that he held the caſtle of Dingwall *in right of his wife* (*g*).

Hiſtorians generally ſuppoſe, that the reſignation by the nun occaſioned the battle of Harlaw, a remarkable event in the Scottiſh annals (*h*).

Notwithſtanding

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*f*) See below, note (*h*).

(*g*) *Fordun*, l. 15. c. 22. "Acceſſit Gubernator ad caſtrum de Dingwall, quod fuit "Domini Inſularum *ex parte uxoris ſuæ*."

(*h*) Our hiſtorians, following Boece, l. 16. fol. 341. repreſent the formidable inſurrection of the Lord of the Iſles, and the deſperate combat at Harlaw in 1411, as the conſequences of the nun's reſignation, and the obſtinacy of the Duke of Albany in vindicating that reſignation. It is evident from the words of Boece, that he had actually peruſed the deed. The charter following on that deed has been diſcovered lately, lying looſe in the regiſter-houſe. It is thus conceived. "Robertus Dux Albaniæ, &c. dediſſe, &c. "cariſſimæ nepti noſtræ, Eufamiæ de Leſley, filiæ et hæredi quondam Alexandri de "Leſley, Comitis de Roſſe, totum et integrum comitatum de Roſſe, &c. Qui, quæ, et quod "fuerunt dictæ Eufamiæ hæreditariè; et quem, quas, et quod eadem Eufamia, non vi aut "metu ducta, nec errore lapſa, ſed merâ et ſpontaneâ oluntate ſuâ, *in ſua pura et integra virginitate*, in præſentia Venerabilium in Chriſto Patrum Domini Finlai, Epiſcopi "Dunblanen. &c. in caſtro de Strivelyne, die Mercurii, 12mo die menſis Junii ultimo, præterit: in manus noſtras, &c. reſignavit, &c. Tenend. &c. prædictæ Eufamiæ, et *hæredibus ſuis* de corpore ſuo legitimè procreandis; quibus forte deficientibus, Johanni Stewart, Comiti Buchaniæ, filio noſtro cariſſimo, et *hæredibus ſuis maſculis* de corpore ſuo legitimè procreat. ſeu procreand.; quibus forſan deficien. Roberto Stewart fratri ſuo germano, et hæredibus ſuis maſculis de corpore ſuo legitimè procreat. ſeu procreand.; quibus forſitan deficien. Domino noſtro Regi, et *hæredibus ſuis* regibus Scotiæ, de Domino noſtro Rege, et hæredibus ſuis, in feodo, &c. *15th June* 1415."

This reſignation was dated on the 12th June 1415; it is plain therefore that it could not have given occaſion to the battle of Harlaw, fought in 1411; this, however, is a matter of hiſtorical criticiſm, not affecting the queſtion of female ſucceſſion. It may be conjectured, that Donald Lord of the Iſles was ſo early in aſſerting his wife's pretences, 1. Becauſe Euphame, by aſſuming the veil, was dead to the world, and her neareſt of kin came to

Roſs. About 1375.

Notwithſtanding the vigorous efforts of Donald Lord of the Iſles, the Earl of Buchan held the earldom during his life. He was ſlain at the battle of Verneuil in France, 1424. James I. in virtue of the nun's limitations, aſſumed the earldom. This was an object of infinite moment to James I. in his great plan of annihilating the Scottiſh ariſtocracy. In 1427, he held his ſanguinary parliament at Inverneſs. The pretence was, to ſuppreſs the bands of robbers, whereof the number exceeds belief. It is probable, however, that he had in view to humble the Lord of the Iſles, whoſe predeceſſors had aſſerted an independency dangerous to Scotland, and, as ſovereign princes, had treated with the Engliſh kings (*i*).

At this parliament, James formed a plan for ſeizing Alexander Lord of the Iſles, his mother the Counteſs of Roſs, and moſt of the Highland chieftains. By a ſpecious invitation, he enticed them ſingly into the caſtle of Inverneſs, and there ſecured them in cloſe and ſeparate confinement. He put many of them to death, detained the Counteſs of Roſs in priſon, but diſmiſſed her ſon.

Not long after, the Lord of the Iſles came down upon Inverneſs, and burnt the town.

In 1429, the King routed the army of the Lord of the Iſles, compoſed of Iſlanders and Roſsſhire-men: he conſtrained him to make ſubmiſſions. By this time, it would ſeem, that the old Counteſs was dead; for Alexander took the title of *Earl of Roſs* (*k*). In 1431, he

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

be in her right. 2. The nun may have made an abſolute reſignation in favour of the Albany family; this the Lord of the Iſles may have conſidered as ſufficient to diveſt her, but not importing any effectual conveyance to the Albany family. The Duke of Albany may have conſidered ſuch a reſignation as a meaſure too ſtrong; and therefore judiciouſly took a new one, whoſe injuſtice was leſs immediate and glaring. To ſuppoſe that, in the charter, he has purpoſely miſdated the reſignation, would imply too violent a charge againſt him.—This charter is remarkable on another account: it eſtabliſhes, beyond poſſibility of cavil, the diſtinction between *hæredes ſui* and *hæredes maſculi* at the beginning of the 15th century.

(*i*) *Rymer*, t. 8. p. 146. t. 12. p. 400. et *paſſim*.

(*k*) *Alexander de Ile, Comes Roſſiæ*, on the 24th October 1429, grants a precept to Alexander Sutherland of Dunbeath. Original in the poſſeſſion of the claimant.

gave

gave him a free pardon (*l*). He alſo yielded up the earldom to him (*m*). Both he and his ſon John bore the title of *Earl of Roſs*, in charters, grants, and other deeds of a public nature (*n*). Roſs. About 1375.

This John Earl of Roſs forfeited in 1475. In the following year, the earldom was unalienably annexed to the crown by act of parliament; with power, nevertheleſs, to the King and his ſucceſſors to beſtow the earldom on a ſecond ſon of the royal family (*o*).

OBJECTION.

p. 32. Sir Robert Gordon obſerves, "That the charter 1370 is only a conveyance of the land-eſtate: That it appears from *Rymer*, that in 1374, "Walter Leſley is deſcribed by the name of *Miles*; in 1375, having "ſucceeded to the eſtate of Roſs, he is deſigned *Dominus de Roſs*, i. e. "laird or proprietor of the eſtate of Roſs; in 1379, having been created Earl of Roſs, he is named *Comes de Roſs*; ſo that his wife came "properly to be called *Counteſs of Roſs*, as being wife of an Earl."

ANSWER.

The ſuperſtructure is much wider than the foundation. If the charter 1370 did not convey the earldom, dignity as well as lands, it will be found, that the ancient peerages of Scotland are at this day held by no better title than a dubious, excep-

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*l*) The tranſactions concerning Alexander Lord of the Iſles, and his mother the Counteſs of Roſs, are to be found in *Fordun*, l. 16. c. 15. 16. He expreſsly calls the mother *Counteſs of Roſs* in 1427, and the ſon *Earl of Roſs* in 1431. "Rex remiſit omnem offenſam *Comiti Roſſenſi*."

(*m*) Whether James I. acted from the ſole principle of juſtice, or from an apprehenſion that he had engaged in an enterpriſe beyond his force, is a queſtion which muſt remain undecided.

(*n*) This hiſtory of the earldom of Roſs is fully ſtated in the MS. Collections of Lord Ochiltree and Sir James Balfour, and in other hiſtories of Scotland; it is vouched by public records, and it is thought will ſcarcely be queſtioned Any one who is inclined to peruſe a perfect compoſition of blunders and abſurdity, may conſult the article *Roſs* in Fraſer of Lovat's *Anſwers*, p. 23. 25. July 14. 1729.

(*o*) *Act* 71. parl. 9. James III. July 1476.

tionable

Roſs. About 1375. tionable preſcription. That Walter Leſley was by Edward III. called *Dominus de Roſs* in 1375, will not deprive his wife of the dignity of *Counteſs of Roſs*; nor will his being called *Earl* in 1379 infer a creation in his favour. In former days, it was common to give an imperfect ſtyle to perſons of rank. A few examples may ſuffice to prove what every antiquary knows. Thus Fordun, l. 11. c. 1. ſpeaks of *Duncanus Comes de Fife* in 1291; and yet, in the ſame chapter, he calls him *Duncanus de Fife*, without any addition. Thus alſo, Duncan, 12th Earl of Fife, is called *Duncan de Fife*, without any addition, and *that* in a letter from Edward I. to the Pope, praying a diſpenſation for his marriage with Mary de Monthermer, Edward's niece. *Rymer*, t. 2. p. 1024. Thus Alexander Stewart is named *Comes de Buchan*, in a charter by Robert II. 5th July *anno regni* 12.; and yet in another charter granted to him by Robert II. on the 22d of the ſame month, he is named *Dominus de Badenach*, without any addition. Thus Iſabella de Marr is called *Comitiſſa de Garriach* in 1393, *Obligation* by Robert III. to Thomas Lord Erſkine; and yet, in 1403, ſhe calls herſelf *Domina de Garriach*. See *Chartulary of Aberbrothock*, vol. 2. fol. 7. In the very ſame year ſhe calls herſelf *Comitiſſa de Garriach*. See *records*, charters, b. 7. N° 257. Thus her huſband Alexander Stewart calls himſelf *Dominus de Gareoch*, in an original charter, 20th April 1406; and *Comes de Gareoch*, in another original charter, 12th November 1428. Not even Sir Robert Gordon will preſume a new creation in this laſt; which is preciſely ſimilar to that of Walter Leſley, *Dominus de Roſs*, and *Comes de Roſs*. To give one example more: Walter Stewart the regicide, though Earl of Athole, *Strathern*, and Caithneſs, is ſtyled *Dominus de Brechin*. *Record* charters, b. 3. N° 48.

There is a difficulty attending Sir Robert Gordon's hypotheſis, of which he ſeems not aware: If the charter 1370 conveyed both dignity and eſtate, then Euphame the wife of Walter Leſley, Euphame the nun, Margaret the wife of the Lord of the Iſles, and her deſcendents, had all of them right to the peerage of Roſs: but if the peerage was not deſcendible to *heirs-general*, it was certainly deſcendible to the *heirs-male* of Hugh Earl of Roſs.

Now, ſuppoſing, for argument's ſake, that it was deſcendible to *heirs-male*, it is demonſtratively certain, that it muſt have gone to the male iſſue of Hugh Roſs of Rarichies, the heir-male of Hugh Earl of Roſs, and of conſequence ſtill belongs to his deſcendents exiſting in the male line. Such being the caſe, the crown, by creating Walter Leſley *Earl of Roſs* in 1379, beſtowed that title on him to the prejudice of the heirs-male of the family then exiſting, and to the prejudice of all their poſterity. It repeated this injury, according to Sir Robert's argument; for he muſt likewiſe hold, that it granted a new creation in favour of the heirs of Margaret, the wife of Donald Lord of the Iſles. Such are the unavoidable conſequences of Sir Robert's hypotheſis; whereas, according to the claimant's ſtate of the caſe, every thing is clear and conſiſtent; the earldom of Roſs deſcended from heir-general to heir-general, in the common courſe of ſucceſſion, until the forfeiture of John Earl of Roſs in 1475.

SECT.

SECT. VIII.

ANGUS, 1377.

THE earldom of Angus having returned to the crown by the forfeiture of the Umfravilles, was conferred, by David II. on Sir John Stewart of Bonkill. Angus. 1377.

This Sir John was ſucceeded by his ſon Thomas.

Thomas, 2d Earl of Angus, had two children; Thomas, 3d Earl of Angus, and Margaret.

Thomas, 3d Earl of Angus, died in 1377 without iſſue.

He was ſucceeded in his eſtate and dignity by his ſiſter Margaret (*a*).

She married, 1. Thomas Earl of Marr. Upon his death, without iſſue, ſhe married William Earl of Douglas; by whom ſhe had a ſon, George.

Upon her reſignation in parliament, in 1389, Robert II. granted the earldom of Angus to *George de Douglas* her ſon, and his heirs lawfully to be procreated of his body;—to *Sir Alexander de Hamilton*, and Eliſabeth, ſiſter of the ſaid lady the Counteſs, and to the heirs, procreated, or to be procreated between them;—to the lawful heirs whatſoever of the foreſaid Eliſabeth;—reſerving to the ſaid Counteſs the franc tenement of the earldom and lordſhips foreſaid during all the days of her life (*b*).

This

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*a*) *Charter*, by Margaret Counteſs of Marr and *Angus*, daughter and heir of the deceaſed Thomas Stewart Earl of Angus, 12th Auguſt 1381, confirming a grant made to Sir John Lion by William Earl of Douglas and Marr.—*Charter*, by Robert II. 10th April 1389, confirming a donation by *Margaret Counteſs of Angus and Marr*.

(*b*) This charter is the earlieſt now extant of the earldom of Angus. It is conceived, "Georgio de Douglas, et hæredibus ſuis de corpore ſuo legitimè procreandis; quibus for-

Angus. 1377. This George de Douglas married the daughter of Robert III. To the marriage-contract 1397, the King and George's mother are parties. She is there ſtyled, " Counteſs of Marr and of *Angus*;" but George is ſtyled, " Lord of Angus (*c*)."

In a ſubſequent charter, granted by Robert III. 1398, George is ſtyled *Earl of Angus* (*d*).

OBJECTION.

Sir Robert Gordon endeavours, as uſual, to elude the force of this p. 21. 31. inſtance, by obſerving, " That it is highly probable, that William Earl " of Douglas would be created Earl of Angus, *to himſelf, and the* " *heirs-male of the marriage*, when he married the heireſs of the e- " ſtate." What Sir Robert, upon conjecture, without evidence, ſuggeſts, as *highly probable* in p. 21. riſes to *certainty* in p. 31. *There* it is ſaid, " It has been *ſhewn*, p. 21. that upon the death of Thomas " without heirs-male, the peerage became extinct; that it was revived " in the perſon of Margaret's huſband, William Douglas; and that *upon* " *his death*, George, the ſon of that marriage, took the peerage, even " during the lifetime of his mother."

ANSWER.

It is a moſt improbable ſuppoſition, that William Earl of Douglas was created *Earl of Angus*. What purpoſe could it ſerve for him to acquire a new title? It could not add to his dignity, power, or influence. He certainly conſidered himſelf as better born than any deſcendent of Sir John Stewart of Bonkill.

The ſuppoſition that he took the title to the heirs-male of the marriage, ſo far from being *highly probable*, is *palpably erroneous*. Sir Robert will admit,

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

" tè deficientibus, Alexandro de Hamilton, Militi, et Eliſabeth, ſorori dictæ Dominæ Co- " mitiſſæ, et hæredibus inter ipſos procreatis ſeu procreandis; et illis deficientibus, legi- " timis hæredibus prædictæ Eliſabeth quibuſcunque; libero tenemento dictorum comitatûs " et dominiorum eidem Comitiſſæ reſervato pro toto tempore vitæ ſuæ."

(*c*) *Contract of marriage*, 24th May 1397, in the poſſeſſion of Sir Robert Gordon's agent; and whereof a copy is printed in the Appendix for Archibald Douglas, Eſq; p. 34.; an authority referred to by Sir Robert Gordon.

(*d*) *Charter* Robert III. " Georgio de Douglas Comiti de Angus, et *hæredibus ſuis*."

that

that William Earl of Douglas died in 1384. His eldeſt ſon, James Earl of Douglas, was ſlain at Otterburn in 1388. Now, as George Douglas was the heir of the marriage with Margaret, it follows, according to Sir Robert's own argument, that George Douglas was Earl of Angus from 1384; and yet it has been ſhewn, that in 1389 he was ſtyled *Georgius de Douglas*, without any addition whatever, and *that* in the very deed wherein his mother is ſtyled *Comitiſſa de Angus*. Nay more, in his marriage-contract with the King's daughter in 1397, he is ſtyled only *Lord of Angus*, in virtue of his right of apparency, while his mother is ſtyled *Counteſs of Angus*. Thus, by Sir Robert's hypotheſis, George Douglas continued in name, a commoner, for *thirteen years*; during all which time he was actually Earl of Angus. Either this unvouched ſtrange improbability muſt be held, or it muſt be held that Margaret was Counteſs in her own right. Angus. 1377.

Neither is it of conſequence, that, in 1398, Robert III. his father-in-law, gives him the appellation of *Comes de Angus* during the lifetime of his mother. According to Sir Robert's general courſe of reaſoning, this ought to have been in conſequence of a new creation in 1398; but he never creates peers, unleſs where it ſerves his purpoſe. The obvious ſolution is, that he was called *Earl of Angus* in 1398, becauſe he was the heir-apparent, and in the fee of the earldom. A ſimilar inſtance occurs in the title-deeds of the earldom of Sutherland. Beſides, Counteſs Margaret was no party to the charter 1398; and a ſtyle given to her ſon in a charter to which ſhe was no party, could not impair that right which it has been ſhewn from the deeds 1389 and 1397 was actually in her.

SECT. IX.

MARR, 1379.

THIS is one of the earldoms whoſe origin is loſt in its antiquity. It exiſted before our records, and before the æra of genuine hiſtory. Marr. 1379.

In 1171, William I. granted a renewal of the inveſtitures of this earldom to Morgund, the ſon and heir of Gillocherus Earl of Marr, "to be held by the ſaid Morgund and *his heirs* (*a*)."

The

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*a*) This curious writing is preſerved by the excellent *Selden*, Titles of Honour, p. 848. It runs thus. "Willielmus Rex Scotorum, univerſis Epiſcopis, Comitibus, Abbatibus, "Prioribus, Baronibus, Militibus, Thanis, et Præpoſitis, et omnibus aliis probis homini- "bus totius terræ ſuæ, tam clericis quam laicis, ſalutem æternam in Domino. SCIATIS "præſentes et futuri, Morgundum, filium Gillocheri quondam Comitis de Marre, in meu "præſentia

Angus. 1377. The deſcendents of Morgund, in the direct line of ſucceſſion, enjoyed this earldom. Donald Earl of Marr was ſtifled to death at the rout of Duplin in 1332 (*b*).

Donald left a ſon, Thomas; and a daughter, Margaret. Thomas married Margaret, eldeſt daughter of Thomas Earl of Angus; but died without iſſue.

The earldom devolved on his ſiſter Margaret, and ſhe bore the title of *Counteſs of Marr* (*c*).

She married William Earl of Douglas, who thereupon added the title of *Marr* to his own title of *Douglas* (*d*).

By William Earl of Douglas ſhe had iſſue a ſon, James; and a daughter, Iſabel.

This lady was early divorced from her huſband; for about 1369 there is a grant of lands made to Archibald Douglas, generally believed to be her huſband's ſon by a ſecond marriage (*e*).

It

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

" præſentia veniſſe, apud Hindhop Burnemuthæ, in mea nova foreſta, decimo kalenda-
" rum Junii, anno gratiæ MCLXXI. petendo jus ſuum de toto comitatu de Marr, coram
" communi conſilio et exercitu regni Scotiæ ibidem congregato: Ego verò cupiens eidem
" Morgundo, et omnibus aliis, jura facere, ſecundum petitionem ſuam, jus ſuum inquiſivi
" per multos viros fide dignos, videlicet, per Barones et Thanos regni mei; per quam in-
" quiſitionem inveni dictum Morgundum filium et hæredem legitimum dicti Gillocheri
" Comitis de Marr; per quod conceſſi et reddidi eidem Morgundo totum comitatum de
" Marr, tanquam jus ſuum hæreditarium, ſicut prædictus Gillocherus, pater ſuus, obiit
" veſtitus et ſaiſitus: Tenendum et habendum eidem Morgundo, et *hæredibus ſuis*, de me,
" et hæredibus meis, in feodo et hæreditate, cum omnibus pertinentiis, libertatibus, et
" rectitudinibus ſuis, adeo liberè, quietè, plenariè, et honorificè, ſicut aliquis Comes de
" regno Scotiæ liberiùs, quietiùs, plenariùs, et honorificentiùs, tenet vel poſſidet; facien-
" do inde ipſe, et *hæredes ſui*, mihi, et hæredibus meis, forinſecum ſervitium, videlicet,
" ſervitium Scoticanum, ſicut anteceſſores ſui, mihi et anteceſſoribus, facere conſueve-
" runt."

(*b*) *Fordun*, l. 13. c. 24.

(*c*) *Charter* by James Earl of Douglas to John Bentay, " ad inſtantiam chariſſimæ no-
" ſtræ Dominæ Margaretæ Comitiſſæ de Douglas et *Marr*;" 3d April 1385. *Sir James Dalrymple's* Collections, p. 380.

(*d*) *Record* Charters, Roll 5. N° 91. &c.

(*e*) *Charter*, 4omo Dav. II. to Archibald Douglas of the lordſhip of Galloway.

The

It appears, that ſhe afterwards married Sir John Swinton (*f*). Marr. 1379.

Her firſt huſband, the Earl of Douglas, died in 1385; and was ſucceeded by her ſon James (*g*). During his mother's life, he took the ſtyle of *Earl of Douglas* only, and *that* in the deed wherein his mother is called " Counteſs of Douglas and Marr (*h*)."

Upon her death, he took the title of *Earl of Douglas and Marr*. He was ſlain at the battle of Otterburn in 1388; and was ſucceeded in the earldom of Douglas by Archibald, ſaid to have been his brother-conſanguinean, and in the earldom of Marr by his ſiſter-german, Iſabel *Counteſs of Marr* (*i*).

OBJECTION.

p. 31. " This, ſays Sir Robert Gordon, is an unlucky inſtance. It was made " clear as the light in the condeſcendence given in in the competition for " the peerage of Lovat, that her huſband, the Earl of Douglas, was " the peer, not ſhe: for after his death, his ſon was deſigned " Comes " de Douglas, et de Marr," in ſeveral charters, although his mother " Margaret was then alive. *Vide*, *Anſwers*, 14th July 1729, to Mr " Mackenzie's condeſcendence in the Lovat papers, p. 16.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

The ſecond wife of William Earl of Douglas was Margaret, daughter of Patrick Earl of March. His *third* wife, which is ſingular, was Margaret, the widow of his *firſt* wife's brother. *Douglas*'s *Peerage*, and authorities there quoted, p. 185.

(*f*) *Crawfurd*'s Peerage, p. 296. ſays, " I have ſeen a charter granted by James Earl of " Douglas and Marr to the monks of Melros in 1388, in which Sir John Swinton is called " *his deareſt father*."

(*g*) *Fordun*, lib. 14. c. 49.

(*h*) *Charter*, by James Earl of Douglas, 3d April 1385, quoted at note (*c*).

(*i*) " Cui ſucceſſit Archibaldus Douglas Dominus Galvidiæ *ad comitatum de Douglas*." *Fordun*, lib. 14. c. 53. Charters by Robert. III. 1398 and 1403. reſpecting " *Iſabella Co-* " *mitiſſa de Marr et de Garriach*."

ANSWER.

Marr. 1379. Since Sir Robert Gordon has thought proper to adopt this ſtrange unlearned rhapſody, it will be neceſſary to tranſcribe the paſſage "which *made it as clear* "*as the light*, that William Earl of Douglas was the peer, not his wife." It runs thus: "It appears as plain as any thing can be, that the honour was in the "Earl of Douglas himſelf, and not in the Lady, his wife, though the eſtate "was in her perſon: for after the death of the Earl of Douglas in 1384, James, "his ſon, is deſigned *Comes de Douglas, et de Marr*, in ſeveral charters in the "roll of King Robert II. although his mother was then alive, and who long "ſurvived him, and married a ſecond huſband, Sir John Swinton, who calls "himſelf *Dominus de Marr*, as appears by a writ in the hands of the Duke of "Queenſberry, in 1389."

There are ſeveral things which the author of this paſſage ought to have explained, in order to make his argument *as clear as the light*. 1. What could have induced William Earl of Douglas to ſeek to be Earl of Marr, any otherwiſe than as huſband to Counteſs Margaret? The acceſſion of ſuch a title by grant from the crown, could that have been obtained, would not have added to his dignity, nor to his power and influence.

2. How came it to paſs, that the ſon of this Earl Douglas and Counteſs Margaret contented himſelf with the title of *Earl of Douglas*, while he calls his mother *Counteſs of Douglas and Marr?*

3. If William Earl of Douglas was alſo Earl of Marr, how came it to paſs, that his ſecond ſon, Archibald, was not *Earl of Marr*, as well as *Earl of Douglas?*

4. What evidence is there that James Earl of Douglas took the ſtyle of *Earl of Marr* in the lifetime of his mother? or that ſhe long ſurvived him? Her ſecond huſband, Sir John Swinton, may naturally have ſtyled himſelf *Dominus de Marr*, as having a certain right to the revenues of that earldom by courteſy, in virtue of his marriage with an heireſs; but his aſſuming that ſtyle in 1389, is no proof that Counteſs Margaret was alive in 1389.

5. If James Earl of Douglas was put in the fee of the earldom by his mother, what would have been the impropriety of his ſtyling himſelf *Earl of Marr* even in his mother's lifetime?

It is probable, that none of thoſe queries ever occurred to the writer of the *Anſwers for Simon Fraſer*. He had an hypotheſis to defend, where very poſitive aſſertions frequently ſupply the place of hiſtorical knowledge, argument, and truth.

Whether the inſtance of Margaret Counteſs of Marr is ſo *unlucky an inſtance* for Lady Eliſabeth, may now be ſubmitted without further reaſoning.

SECT.

SECT. X.

LENNOX, before 1384.

Lennox. Before 1384.

THE Earls of Lennox are mentioned in hiſtories and public deeds ſo far back as the twelfth century (*a*).

In 1238, Alexander II. granted to "Maldoveny [or Maldwin], "filio Alwini Comitis de Levenax, *comitatum de Levenax, quem pater "ejus tenuit*, cum omnibus juſtis pertinentiis: Tenend. *ſibi et hæ-"redibus ſuis*, de nobis et hæredibus noſtris, in feodo et hæredi-"tate (*b*)."

In 1272, Alexander III. granted a charter, "Malcolmo Comiti de "Levenax," of certain lands, "tenend. &c. dicto Malcolmo, *et hæ-"redibus ſuis*, de nobis, &c. in liberam forreſtam (*c*)."

From Maldwin, and Malcolm, the earldom deſcended, in the direct line of male ſucceſſion, to Donald, 6th Earl of Lennox. He was one of the *Magnates Scotiæ* who granted commiſſion for treating about the ranſom of David II. (*d*)

This Donald died, leaving iſſue an only daughter, Margaret, married to Walter, ſon of Allan de Faſlane.

In 1384, Robert II. granted a charter to Walter de Faſlane, which

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*a*) Fable and tradition carry them farther back: There was a Saxon Lord called *Arkill*, who withſtood William the Conqueror; in the family of Lennox there was one Arkyll M'Arkyll; and *therefore* he was the grandſon of the Saxon Arkill by a ſecond marriage.—The claimant ſatisfies herſelf with tracing the laws of Scotland, and the hiſtory of families, as far back as records extend; ſhe leaves her competitor maſter of the ages of conjecture, and hiſtorical theory.

(*b*) *Chartulary of Lennox*, N° 16. 24to Alexander II.

(*c*) *Chartulary of Lennox*, N° 12. 23tio Alexander III.

(*d*) *Rymer*, t. 6. p. 43.

deſerves

Lennox. Before 1384.

deſerves particular attention, becauſe it illuſtrates the ideas of the fourteenth century concerning peerages, in a more forcible manner than any laboured argument can do. By it the Sovereign grants "Waltero de Foſſelane, Domino de Levenax, *et hæredibus ſuis Comitibus de Levenax*, demonſtrationes armorum totius dicti comitatûs de Levenax, &c. Et quod nec dicti *Comites*, nec eorum hæredes, nec aliqui alii homines manentes infra dict. comitatum, comparebunt coram Vicecomitibus noſtris, ſed ubicunque probaverint in dicto comitatu ſuam demonſtrationem armorum retinen. De qua quidem dicta armorum demonſtratione videbamus evidentiam factam Malcolmo Comiti de Levenax, et *ſuis hæredibus*, per Robertum Regem Scotiæ, noſtrum prædeceſſorem, ſub forma præſcripta. Inſuper conceſſimus *dicto Waltero, et hæredibus ſuis Comitibus de Levenax*, quod ipſe, et ſui dicti hæredes, gaudeant pro perpetuo omnibus et ſingulis libertatibus infra comitatum prædict. quibus *ipſe, aut anteceſſores ſui, Comites ejuſdem*, uſi ſunt tempore noſtro, aut prædeceſſorum noſtrorum *Regum Scotiæ* temporibus quibuſcunque retroactis," &c. (*e*)

Words cannot more ſtrongly expreſs the notion of thoſe times, that it was the poſſeſſion of the *comitatus* which conferred the dignity of *Comes*. It will not be diſputed, that *Walter de Faſlane* had no right to the *comitatus*, other than as the huſband of *Margaret de Lennox*; the ſame charter which in one place terms Walter de Faſlane *Dominus de Levenax*, in another holds him to be *Comes de Levenax*; nor can it be ſuppoſed, that the *anteceſſores* of Walter de Faſlane were *Comites*, and that the *hæredes ſui* were alſo to be *Comites*, while he himſelf remained a commoner. The grant of muſters is founded on a former grant, by Robert II. to Malcolm Earl of Lennox, *et ſuis hæredibus*. This would have been altogether impertinent, had *ſui hæredes* meant *heirs-male:* for then the meaning of the Sovereign

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*e*) *Chartulary of Lennox*, N° 13.

would

would have been this: " My father beſtowed on the *heirs-male* of " the Earl of Lennox the right of ſummoning to *weaponſhawings* " or muſters; and therefore I take that right from them, and *beſtow* " it on you, who are married to the *heir-general*, and poſſeſs the e- " ſtate tranſmiſſible to the heirs of the marriage." Lennox. Before 1384.

In conſequence of a reſignation by Walter de Faſlane, and Margaret de Lennox, in 1385, Robert II. granted a charter to their ſon, Duncan, of the tenor following. " Dilecto et fideli noſtro Dunca- " no de Levenax, Militi, totum comitatum de Levenax, et domi- " nium ejuſdem, cum pertinen. Qui quidem comitatus, cum domi- " nio ejuſdem, fuit Walteri, filii Alani, de Foſſelane, et Margaretæ " ſponſæ ſuæ, *ratione dictæ ſponſæ*. Et quæ dicti Walterus et Marga- " reta, non vi aut metu, &c. in præſentia plurium regni noſtri pro- " cerum, die confectionis præſentium, in caſtro noſtro de Streve- " lyne, ſurſum reddiderunt, &c. Tenend. et habend. dictum comi- " tatum, et dominium ejuſdem, cum pertinen. &c. dicto *Duncano*, " *et hæredibus ſuis*, de nobis, &c. adeo liberè, &c. ſicut aliquis de " anteceſſoribus dicti Duncani, dict. comitatum, et dominium e- " juſdem, &c. tenuit ſeu poſſedit (*f*)."

This charter of the *comitatus* is all the right which Duncan had to the dignity of *Comes*. The charter expreſsly bears, that Walter's right was *by reaſon of his wife*; and therefore the right of Duncan was no other than that of Walter.

That this inference is not ſtrained, will beſt appear from the account of the charter 1385, as given by a late author, who wrote under the auſpices of the heir-male of Donald, 6th Earl of Lennox. This teſtimony will not be conſidered as partial to the pretenſions of *heirs-general*. It runs thus: " Walter of Faſlane, and Margaret the " heireſs, were ſucceeded in the territory of Lennox by their eldeſt " ſon, Sir Duncan Lennox, Knight, grandſon of Donald, the 6th

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*f*) *Chartulary of Lennox*, N° 15.

Lennox. Before 1384. " Earl, and heir of line of the family; who, having the proſpect of " a great eſtate, and Malcolm Macfarlane, anceſtor of the Laird of " Macfarlane, the undoubted heir-male of the old Earls, declining " to accept a dignity which he thought he had not eſtate to ſupport, " King Robert II. out of a grateful remembrance of the many and " eminent ſervices performed to the Kings his predeceſſors, by the " family of Lennox, conferred *de novo* upon the ſaid Sir Duncan, " and his heirs, the dignity of *Earl of Lennox*, after it had lain " dormant for the ſpace of eight or ten years, ever ſince the death " of Earl Donald in 1373 (*g*)." It is ſingular, that the authority quoted in ſupport of all this deduction, ſhould be no other than the charter 1385.

The hiſtory of the after tranſmiſſion of the earldom of Lennox belongs not to this part of the argument; it is related elſewhere.

As this inſtance of female ſucceſſion in the ancient earldom of Lennox was not explained in the former caſes, it is not known what objections Sir Robert Gordon may oppoſe to it.

SECT. XI.

MARR, 1388.

Marr. 1388. JAMES Earl of Douglas and Marr, ſlain at Otterburn 1388, left no iſſue.

The earldom of Douglas went to Archibald, ſaid to have been his brother-conſanguinean; the earldom of Marr, to his ſiſter-german, Iſabel. She was *Counteſs* of Marr (*a*).

Concerning this lady, there are more writings extant, than concerning any other Scottiſh peer of ancient times; and they all agree in proving her to have been Counteſs of Marr in her own right.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*g*) *Douglas, Peerage*, p. 397.

(*a*) Charters, by Robert III. in 1398 and 1403, reſpecting " *Iſabella Comitiſſa de Marr* " *et de Garriach.*"

She

She was married twice: 1. To Sir Malcolm Drummond, brother of Annabella, the Queen of Robert III. 2. To Alexander Stewart, the natural ſon of Alexander Earl of Buchan, fourth ſon of Robert II. Marr. 1388.

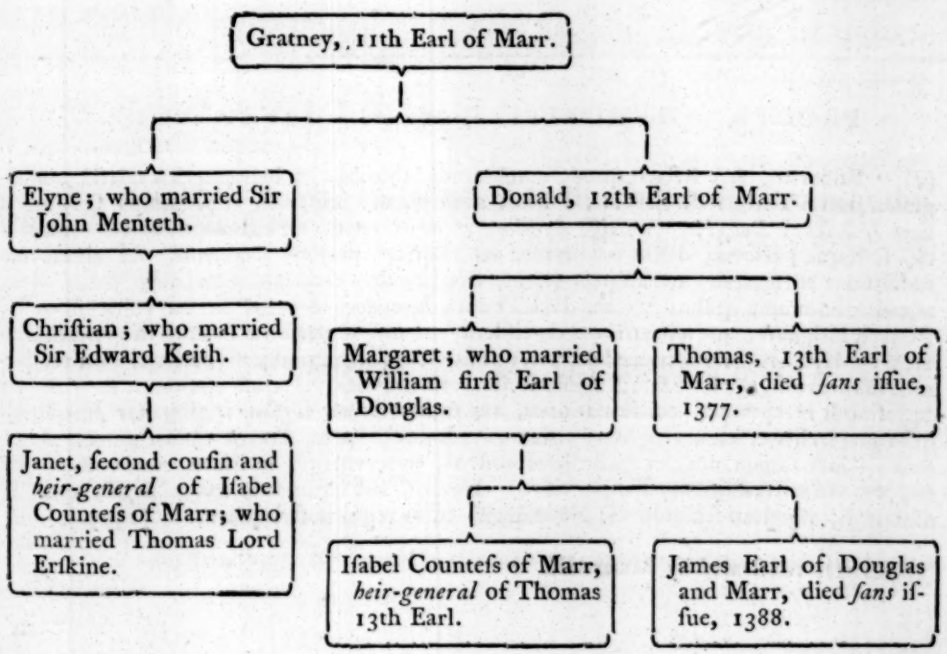
Her firſt huſband, Sir Malcolm Drummond, was ſtyled *Dominus de Marr* (*b*). Why he did not aſſume the title of *Earl of Marr*, as the huſbands of peereſſes generally did, is uncertain; and it is judged better to leave it uncertain, than to account for it by doubtful conjecture.

Janet Keith, the wife of Thomas Lord Erſkine, was the undoubted heir-general of Counteſs Iſabel in the earldom of Marr. She was the grand-daughter of Elyne, the daughter of Gratney, 11th Earl of Marr (*c*).

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*b*) Charter Robert III. 5th March, anno regni 9no, confirming a charter by Robert Duke of Albany to his ſon John Stewart, of the baronies of Coul and Onell, dated 18th February 1398; to which *Malcolmus de Drummond Dominus de Marr* is a witneſs.

(*c*) The following pedigree will ſhew the connection between the old Earls of Marr and Lord Erſkine.



In

Marr. 1388. In 1395, Lord Erſkine, being juſtly apprehenſive of attempts to diſappoint the ſucceſſion of his wife, took an obligation, under the great ſeal, from Robert III. By it the King became bound, not to ratify any contract, or accept of any reſignation, by which *Iſabella de Douglas, Counteſs of Marr and Gareoch*, might attempt to alienate thoſe earldoms, or any part of her lands, in prejudice of the true heirs thereof. Such is the ſubſtance of this obligation. It is tranſcribed below from the original (*d*).

On the 3d November 1402, Iſabella, *Comitiſſa de Marr, et Domina de Garrioch*, granted a charter of certain lands to Alexander de Keth (*e*).

In 1403, Iſabel Douglas, " *Comitiſſa de Marr, Domina de Garvyach*," in her widowity, confirmed to the abbacy of Aberbrothock, a carrucate of land in Kyalchmund, which had been granted to that abbacy by David Earl of Garrioch, brother of William King of Scots. She renewed this grant, " pro ſalute animarum quondam " bonæ memoriæ, Domini Willielmi de Douglas, patris noſtri, et " Dominæ Margaretæ de Douglas, Comitiſſæ ejuſdem, noſtræ ma- " tris, et ſalute animæ noſtræ, et fratris noſtri, quondam Domini " Jacobi de Douglas, Comitis ejuſdem, et prædeceſſorum noſtrorum

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*d*) " Robertus, &c. Sciatis quod, conſideratis laboribus et bene meritis dilecti conſan- " guinei noſtri Thomæ de Erſkine, Militis, multipliciter impenſis, conceſſimus ſibi, quod " licet *Iſabella de Douglas, Comitiſſa de Marr et de Gareoch*, ex informatione vel contractu " cujuſcunque perſonæ, dictos comitatus, vel aliquam partem terrarum, vel annuorum " reddituum eorundem, aut aliquas terras, ſive annuos redditus ſuos alibi jacen. infra " regnum noſtrum, quibus *hæredes* dicti Thomæ ſuccedere debent, in hæreditatem nobis " voluerit reſignare, aut alienationes de eiſdem cuicunque perſonæ facere, in præjudicium " *verorum hæredum ſuorum* concedentium, nos ſiquidem hujuſmodi reſignationes non recipie- " mus in futurum, nec hujuſmodi alienationes, ratificationes, vel confirmationes. Et ſi aliquas " hujuſmodi receptiones, confirmationes, aut ratificationes forſan negligenter fecerimus, " ipſas pro irritis et vacuis reputari volumus et haberi, ita ut careant virtute penitus firmi- " tatis;—jure tamen nos, et ſucceſſores noſtros, concernente, in iiſdem comitatibus, ter- " ris, aut annuis redditibus, ſemper ſalvo. Datum, ſub teſtimonio magni ſigilli, apud E- " dinburgh, vigeſimo ſecundo die Novembris, anno regni noſtri quarto." [1395.]

(*e*) Charter confirmed by Robert III.

" in

" in hac parte." This grant is dated at Kyndromy [Kildrummie], the capital meſſuage of the family of Marr, 27th May 1403 (*f*). Marr. 1388.

Alexander Stewart, a natural ſon of the Earl of Buchan, was a daring adventurer of thoſe days. Hiſtorians agree, that his firſt appearance in life was at the head of a formidable band of robbers in the highlands of Scotland (*g*).

This perſon caſt his eyes on the Counteſs of Marr. He ſtormed her caſtle of Kildrummie; and whether by violence, or by perſuaſion, obtained her in marriage.

On the 12th Auguſt 1404, under the title of *Iſabel Counteſs of Marr and Garriach*, ſhe granted her earldom of Marr and Garriach, with all other lands, &c. belonging to her by right of inheritance, to " Alexander Stewart, and the heirs to be procreated between him " and her; whom failing, *to his lawful heirs and aſſignees whatever*," to be held as freely (ſays the deed) as we or our predeceſſors, Earls of Marr or of Douglas, held the ſame (*h*).

It would ſeem, that Alexander Stewart, enterpriſing as he was, ſoon became ſenſible, that, to ſeize the caſtle, to wed the heireſs, and to carry off the earldom from the Counteſs's children by another marriage, were meaſures too bold, even in an age of miſrule.

He therefore endeavoured to palliate his conduct, and, in appearance, to repair the injury which he had done by extorting ſo extraordinary a deed as that of the 12th Auguſt 1404.

On the 19th September 1404, he preſented himſelf at the caſtle-gate of Kildrummie, and ſurrendered to the Counteſs, not only the caſtle, but all its furniture, and the title-deeds therein kept. In

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*f*) *Chart. Aberbrothock*, vol. 2. fol. 7.

(*g*) *Fordun*, lib. 16. c. 25. " In juventute erat multum indomitus, et ductor caterva- " norum." *Buchanan*, lib. 10. p. 191. *Edit. Ruddiman.*

(*h*) *Record of Charters*, b. 7. N° 257. Regiſtered, " de ſpeciali mandato Domini Regis," 16th April 1476.

Marr. 1388. teſtimony of this, he delivered the keys into her hands, " *freely,* " *and with a good heart,* for her to diſpoſe of them as ſhe pleaſed."

The Counteſs, " holding the keys in her hands, of mature advice " choſe the ſaid Alexander for her huſband, and in free marriage gave " to him the caſtle, with its pertinents, the earldom of Marr, &c. and " all other lands belonging to, or which might belong to her, ei- " ther by *her father or her mother,* to be held by her ſaid huſband " and herſelf, and *the heirs to be procreated between them; which fail-* " *ing, to the ſaid lady, and her lawful heirs;* upon all which, the ſaid " Alexander took inſtruments (*i*)."

In terms of this declaration, the Lady, under the title of *Iſabella de Douglas, Comitiſſa de Marr, et de Garriach,* granted a charter, 9th December 1404. This charter was ſealed and dated " in preſence " of Alexander Biſhop of Roſs, and the haill tenants, in the fields, " without the caſtle of Kildrummie," that it might appear to have been granted without force on the part of Alexander Stewart, or fear on hers (*k*). This farce was ſanctified by the authority of the Sovereign.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*i*) Inſtrument tranſcribed from the archives of the family of Marr by *Douglas,* Peerage, p. 461. This article of Marr is the moſt curious and accurate of any in the voluminous work of Douglas.

(*k*) " Omnibus hanc cartam viſuris vel audituris, nos *Iſabella de Douglas, Comitiſſa de* " *Marr et de Garviach,* ſalutem in Domino ſempiternam. Noveritis nos, in noſtra pura et " libera viduitate, proviſo ſolemni tractatu et diligente, dediſſe, conceſſiſſe, et hac præ- " ſenti cartâ noſtrâ confirmaſſe, nobili viro Alexandro Seneſcallo, filio Nobilis Domini et " Potentis Domini Alexandri Seneſcalli Comitis Buchaniæ, in liberum maritagium cum " perſona noſtra contrahend. totum comitatum noſtrum de Marr, cum caſtro noſtro de " Kyndrumy, totum dominium noſtrum de *ly Garviach,* cum ſervitiis liberè tenentium no- " ſtrorum dicti comitatûs et dominii, cum eccleſiarum advocationibus, necnon baro- " niam de Strathelvech, infra vicecomitatum de Banff; necnon baroniam de Crechmond " in Buchania, cum omnibus earundem pertinentiis, et ducentas marcas annui redditûs cu- " ſtumæ de Hadington; necnon foreſtam de Gedword, cum omnibus terris ad illam " foreſtam pertinentibus; ac etiam omne jus et clameum quod vel quæ habemus, vel " haberi poterimus, in quibuſcunque terris a nobis injuſtè detentis, tam ex parte patris, " quam ex parte matris: Tenend. et habend. prædicto Alexandro, et hæredibus inter ip- " ſum et nos procreandis; quibus fortè deficientibus, hæredibus noſtris legitimis *ex utra-* " *que parte;* ſemper reſervatis liberis tenementis omnium prædictarum terrarum, cum per- " tinentiis, dicto Alexandro et nobis, et noſtrorum diutius viventi, pro toto tempore " vitæ

Sovereign. Robert III. upon the 21ſt of January 1404-5, by a charter under the great ſeal, ratified the charter 9th December 1404 (*l*). Marr. 1388.

After this ſingular event, Alexander Stewart was uniformily ſtyled *Comes de Marr, et Dominus de Garvyach* (*m*). Under that title he, with conſent of his wife, granted inveſtitures to the vaſſals of the earldom, bearing the lands to be held " de nobis *ratione dictæ conſortis* " *noſtræ* (*n*)."

The Counteſs of Marr died before her huſband, without iſſue. Had the obligation by Robert III. to Lord Erſkine been remembered, or had the limitations in the charters 9th December 1404, and 21ſt January 1404-5, been regarded, nothing would have remained in

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

" vitæ noſtræ, &c.—Volumus etiam et concedimus, pro nobis et hæredibus noſtris, quod " nullus hæredum noſtrorum habeat introitum et ſaſinam, aut poſſeſſionem aliqualem, in " feodo dict. comitatûs, dominii de Garviach, vel aliarum quarumcunque terrarum aut " reddituum, durante tempore vitæ dicti Alexandri, &c. In cujus rei teſtimonium, nos, liberâ " poteſtate exiſtens, non vi coacta, ſed in præſentia Reverendi in Chriſto Patris Alexandri, " Dei gratiâ, Epiſcopi Roſſen. et omnium noſtrorum tenentium, huic præſenti cartæ no- " ſtræ, extra caſtrum noſtrum de Kyndromy, non in eadem clauſa vel detenta, ſigillum " noſtrum apponi fecimus, ibidem, nono die menſis Decembris, anno Domini 1404."—It muſt be obſerved, in paſſing, that Douglas has miſ-tranſlated the clauſe, *Quibus fortè deficientibus, hæredibus noſtris legitimis ex utraque parte.*—He ſuppoſes it to mean to *their lawful heirs;* whereas it is the Counteſs *alone* who ſpeaks. *Ex utraque parte* means, and is ſo expreſſed in the antecedent obligation, " heirs by the mother's ſide as well as the fa- " ther's."—The Counteſs alludes to the hope of ſucceſſion to the Earl of Douglas.

(*l*) *Original* charter, in the claimant's poſſeſſion.

(*m*) *Rymer*, ad. an. 1406. t. 8. p. 460. 461. 500. &c.
Andrew Winton, MS. Chronicle, Advocates Library, has more than one chapter on the actions of Alexander Stewart. Winton was his cotemporary. He conſtantly ſtyles him *Earl of Marr;* for example, he thus ſpeaks of his marriage with the Counteſs of Marr, after the death of Sir Malcolm Drummond.

" Quhen that Malcolm the deid had tane,
" The Erle of Buchan's ſone Stewart
" Alexander hir weddit eftirwart;
" Scho deyt, and till him na barne bair,
" *And he remanyt Erl of Marr.*"

(*n*) *Original* Charter, 20th April 1406, by " *Alexander Seneſcall* Comes de Marr et " Dominus de Gareoch," &c.—It is to be obſerved, that *Garrioch*, a diſtrict of Aberdeenſhire, is variouſly ſpelt in ancient writings, thus, *Garvyach, Garriach, Gareoch.*

Alexander

Marr. 1388. Alexander Stewart but a liferent-right of courteſy to the earldom of Marr. But all this was diſregarded.

It was the great aim of the ſagacious, but too precipitate policy of James I. to unite the ancient earldoms to the crown, and thus to ſap the foundations of a formidable and hated ariſtocracy. What progreſs he made, and how he periſhed in the attempt, is known from hiſtory.

Alexander Stewart, conſcious that he had nothing in him but a liferent-right, uſed the device of reſigning the earldom in the hands of James I. Immediately upon this, a charter of the earldom was granted by the King, " to his dearly-beloved couſins, Sir Alexan- " der Stewart, and Sir Thomas Stewart, his natural ſon; to Sir A- " lexander for his life, and after his death, to Sir Thomas, and the " lawful heirs-male of his body; whom failing, to return to the " crown (*o*)."

Thus the earldom, inſtead of deſcending to the heirs-general of the ancient Earls, was limited to the heirs-male of the body of Sir Thomas Stewart.

That event which the ſagacity of James I. foreſaw, took place in the courſe of a few years. Sir Thomas Stewart died without iſſue. Sir Alexander did not ſurvive him long. He died in 1435 (*p*).

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*o*) " Cariſſimis conſanguineis noſtris Alexandro Stewart, et Thomæ Stewart, filio ſuo " naturali, Militibus. Tenend. et habend. prædicto Alexandro pro toto tempore vitæ ſuæ, " et poſt ejus deceſſum, præfato Thomæ, et hæredibus maſculis de corpore ſuo legitimè " procreatis ſeu procreandis; quibus forſan deficientibus, nobis et hæredibus noſtris libe- " rè reverſur." *Record*, Charter, 28th May 1426, B. 2. N° 8.

(*p*) *Fordun*, l. 16. c. 25. " Anno Domini 1435, circa feſtum Sancti Petri ad vincu- " la, [*Lammas*, 2d Auguſt, corrupted from *ad vincula miſſa*], obiit Dominus Alexander " Stewart, Comes de Marria, baſtardus filius Domini Alexandri Stewart Comitis de Bu- " chania, filii Domini Roberti Secundi Regis. Hic fuit vir magni conqueſtûs, qui in ju- " ventute erat multùm indomitus, et ductor catervanorum [*Katheranes*, bands of robbers " mentioned in the ſtatute-book]; ſed poſtea ad ſe reverſus, et in virum alterum mutatus, " placenter trans montes quaſi totum aquilonem gubernabat. — Homo magnarum opum et " ingentium expenſarum, clari nominis, et famoſus in diverſis regionibus, habebatur; cu- " jus induſtrioſæ probitati adſcripta eſt victoria facta apud Leodium, pro parte Johannis " Ducis Burgundiæ, et ſimiliter apud Harlaw, de inſulanis, ſibi attribuitur præconium " triumphale. Potens enim erat valde in rebus animatis et mobilibus: Quibus omnibus, " *utpote baſtardi*, ſucceſſit Rex."

SECT.

SECT. XII.

MARR, 1435.

THE miniſters of James II. took poſſeſſion of the earldom of Marr as devolved to the crown. Robert Lord Erſkine, the ſon of Thomas Lord Erſkine, and Janet Keith, attempted to vindicate his juſt rights to the earldom. For this purpoſe, he obtained himſelf ſerved neareſt lawful heir to Iſabel Counteſs of Marr (*a*). The evidence of his propinquity was clear; and, in the preſent age, is admitted to be indiſputable. Marr. 1435.

In conſequence of this, Robert Lord Erſkine aſſumed the title of *Earl of Marr*, and granted various charters to the vaſſals of the earldom (*b*).

Nevertheleſs he attained not to the peaceable poſſeſſion of the earldom. The miniſters of James II. had procured an act of parliament, "That no landes nor poſſeſſions pertaining to the King, be given or "granted till onie man, without the advice and conſent of the three "eſtaites of the realme, unto the time of his age of twenty-one "years (*c*)." This ſerved as a pretext for holding poſſeſſion of the earldom of Marr during the minority of the Sovereign.

During the life of Robert Lord Erſkine, various applications were made to parliament, and to the privy council, for reſtitution of

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*a*) *Douglas*, in his Peerage, p. 467. quotes, from the archives of the family of Marr, the ſervice, 22d April 1438, a precept for infefting him as heir to the Counteſs, and the ſeiſin following on it, both in November 1438.

(*b*) *Douglas*, ibid.

(*c*) *Act* 1. *parl.* 1. James II. 1437.—It is termed *act* 2*d* in the printed ſtatutes; but erroneouſly; what is termed *act* 1*ſt* being nothing more than a memorandum of the coronation of James II.

Marr. 1435. the earldom. Terms of accommodation were propoſed, and an agreement for a temporary poſſeſſion was made. Nothing, however, was finally adjuſted when Robert Lord Erſkine died.

Then the crown took a bold meaſure indeed; by an after declaration of the legiſlature, we are authoriſed to give it its true appellation, that of *an act of injuſtice*.

James II. inſiſted againſt Thomas Lord Erſkine in a reduction of his father Lord Robert's ſervice. The reaſons of reduction were *four*: 1. Becauſe there were no witneſſes who could ſwear to his deſcent from Elyne of Marr, long ago dead. 2. Becauſe the ſervice was contrary to the ſtatute, touching the King's right to keep poſſeſſion of all lands whereof his father was poſſeſſed. 3. Becauſe Iſabel Counteſs of Marr was not the perſon laſt ſeiſed in that earldom, but Alexander Stewart, and Thomas Stewart; to both of whom the King was heir, by reaſon of their baſtardy. 4. Becauſe the King himſelf was heir to Iſabel Counteſs of Buchan, as deſcended from Iſabel de Marr, the wife of Robert I. who was the elder ſiſter of Elyne de Marr.

In 1457, an aſſize of error was aſſembled, at Aberdeen, in preſence of James II. The verdict of that aſſize reduced the ſervice of Robert Lord Erſkine; and found, that the King had right to the earldom of Marr, becauſe, in virtue of the charter 12th Auguſt 1404, and the ſubſequent charter 1426, to Alexander, and his natural ſon, the earldom of Marr had devolved to the King, "*ratione baſtardiæ* (*d*)."

It will not eſcape obſervation, that the later charters, 9th December 1404, and 21ſt January 1404-5, were totally overlooked by this aſſize. The reaſon is plain: *They* terminated in a clauſe to the heirs-general of the Counteſs, and gave nothing to the huſband, but a

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*d*) Tranſumpt of the reduction of Lord Erſkine's ſervice, 5th November 1457.

right

right of liferent; they could not be transformed by any royal charter into a right of property in the huſband, and his natural ſon, with a clauſe of return to the Sovereign. Marr. 1435.

The four reaſons of reduction were alſo in themſelves captious, and grounded upon miſtakes in fact as well as law.

This the family of Erſkine demonſtratively proved, as ſoon as a favourable opportunity occurred for ſetting aſide the verdict 1457.

In 1555, John Lord Erſkine obtained leave from the crown to have the queſtion re-tried, Whether he was heir-general to Counteſs Iſabel?

He ſhewed, that the reaſons of reduction on which James II. had obtained the verdict in 1457, were utterly erroneous.

As to the *firſt*, That it was new in law, to plead, that a claimant might not prove his propinquity to remote anceſtors by writings as well as by witneſſes: That if this was ruled for law, the Sovereign, from the lapſe of time, and the defect of living teſtimonies, might arrogate to himſelf half the earldoms in Scotland, as well as the earldom of Marr.

As to the *ſecond*, The ſtatute 1438 might exclude the claimant from poſſeſſion during the minority of the King, but could not prevent the aſſize from taking trial of the propinquity, or ſet aſide the verdict when returned.

To the *third*, the anſwer was obvious, That Alexander Stewart had no more than a right of liferent in him by the charters 9th December 1404 and 21ſt January 1404-5; that he could reſign no more, and that the crown could grant no more upon his reſignation.

To the *fourth*, That it was grounded on an error in fact; for that Iſabel de Marr, the wife of Robert I. was not the daughter, but the ſiſter of Earl Gratney; and conſequently was removed a degree farther back than Elyne, the daughter of Earl Gratney.

Theſe reaſons were ſo ſimple, and ſo concluſive, that on the 5th May 1555, the inqueſt found John Lord Erſkine to be the neareſt heir of Robert Earl of Marr and Garrioch, who was the neareſt heir

of

Marr. 1435. of Iſabel Counteſs of Marr, and of Gratney Earl of Marr, her great-grandfather (*e*).

In 1565, Mary Queen of Scots at length made reparation to the family of Erſkine for the ſhameful oppreſſion which it had endured from her forefathers. She reſtored John Lord Erſkine, and granted a charter of the earldom of Marr to him, his heirs, and aſſignees. This charter proceeds on the narrative, That Iſabel Counteſs of Marr had granted that earldom to Alexander Stewart, her huſband, and to the heirs to be procreated between them; whom failing, to Iſabel's heirs whatever, [alluding to the charter 9th December 1404]; that Iſabel died without iſſue; and that John Lord Erſkine was retoured neareſt heir to Robert therein, and was undoubted heir of Iſabel (*f*). This charter was afterwards ratified in parliament (*g*).

John Lord Erſkine and his heirs did accordingly enjoy the dignity and eſtate of the earldom of Marr, until the attainder of John Earl of Marr for his acceſſion to the rebellion, *1mo Georgii* I.

OBJECTION.

Sir Robert Gordon, in his objections to thoſe inſtances of female ſucceſſion in the earldom of Marr, has multiplied preſumptions upon preſumptions, in ſuch a manner as to *diſtinguiſh* his hypotheſis in this caſe from all his other hypotheſes.

p. 31. As to the firſt inſtance, he admits, " That Iſabella, in a private " charter, 1404, is ſtyled *Comitiſſa de Marr*;" but he adds, " that ſhe " was then in her viduity; and that it is probable, if ſhe truly had " right to the title, that it was *as the wife of a former huſband, who* " *had been created Earl of Marr*."

As to the ſecond, he argues, " That the Lords Erſkine were the heirs " of line of Gratney Earl of Marr; and therefore, if they had had right

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*e*) See all this fully recited by *Douglas*, Peerage, p. 467. & 468. from the archives of the family of Marr.

(*f*) *Record Charters*, B. 32. N° 501. 23d June 1565.

(*g*) *Records* of parliament, B. 13. 1567. and B. 17. 1597.

" to

" to the peerage, they muſt have ſucceeded on the death of Counteſs I- Marr. 1435.
" ſabel; but, on the contrary, they continued in the rank of Lords Ba-
" rons: That the charter by Queen Mary is a grant of the eſtate, not
" of the peerage; and as John Lord Erſkine is ſoon after ſtyled *Earl of*
" *Marr*, it muſt have been by creation from the crown, *by whoſe in-*
" *dulgence* he got the eſtate."

ANSWER.

The recital of facts already premiſed affords an anſwer to thoſe objections, which have been made without a competent knowledge of the facts. It has been ſhewn, that it was not merely in *a private charter* 1404, that Iſabel was termed *Counteſs of Marr*.

It is ſcarcely poſſible that an ancient grant by an heireſs, or in favour of an heireſs, could occur, unleſs during her coverture or her viduity. Every one knows that an heireſs under age never had any adminiſtration of her affairs: *the gift of her marriage* was generally made over to ſome needy, or to ſome powerful courtier. Whichever of thoſe characters belonged to the huſband-expectant, it is obvious, that the young lady would not be permitted to remain in celibacy any longer than neceſſity required. It follows, of unavoidable conſequence, that the name of an heireſs would ſeldom appear on deeds unleſs while ſhe was married or a widow.

In this caſe the preſumption that Counteſs Iſabel had her title in right of a former huſband is ſingular, even in an argument compoſed of preſumptions. To preſume a creation is no great matter, for we are favoured by Sir Robert Gordon with a multitude of ſuch preſumptive creations; but *to preſume a third huſband* to a woman who has two upon record is new. It happens unluckily that Sir Malcolm Drummond, Counteſs Iſabel's firſt huſband, did not follow the common practice of aſſuming the title of *Earl of Marr*; ſo that *he* cannot be the *preſumed* Earl of Marr to whom Sir Robert alludes: it muſt therefore be ſome other perſon. *Who* he was, *when* he lived, and *what* became of him, are queſtions left with Sir Robert to anſwer.

As to the ſecond inſtance, of the Lords Erſkine, heirs-general of Gratney Earl of Marr, it is plain, that if Iſabel had right to the title, ſo had they. That Queen Mary conferred the title of *Earl of Marr* on John Lord Erſkine, is an ideal ſuppoſition; as it alſo is, that Lord Erſkine owed the eſtate of Marr to the *indulgence* of Queen Mary: he owed it to juſtice alone; and nothing leſs than ſuch an example of juſtice could efface the national opprobium of that ſcandalous verdict 1457. To reſtore an earldom to a Noble Lord, of which his predeceſſors had been unjuſtly diveſted for 130 years, was no indulgence. That the family of Erſkine remained Lords Barons for ſo long a ſpace, was the natural conſequence of their being ſo long diveſted of the earldom.

SECT. XIII.

STRATHERN, between 1370 *and* 1414.

Strathern. Between 1370 and 1414.

THE Earl of Strathern is mentioned in the reign of Malcolm IV. (*a*)

The ſucceſſion is held by all our hiſtorians to have been carried down in the direct line of male deſcendents, until Maliſe, 7th Earl of Strathern.

He was one of the Scottiſh nobles who ſigned the letter to the Pope, aſſerting the independency of Scotland, 1320 (*b*).

During the minority of David II. Earl Maliſe oppoſed the invaſion of Edward Baliol. For this he forfeited. The earldom was beſtowed on John Earl of Surrey and Warren, who, from that time, was ſtyled "Comes Surriæ et de Strathern (*c*)."

Maliſe died without being reſtored to the earldom. [He is ſaid to

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*a*) *Fordun*, lib. 8. c. 4. "Sex Comites, *Ferchard*, ſcilicet, *Comes de Strathern*, et alii "quinque, adverſus Regem, non utique pro ſingulari commodo, ſeu proditiosâ conſpira- "tione, immo reipublicæ tuitione commoti, ipſum capere niſi ſunt."

(*b*) *Fordun*, l. 13. c. 2. *Sir James Dalrymple*'s Collections, p. 376. & 377. *Sir James Balfour*'s MS. Collections.

(*c*) *Rymer*, t. 4. p. 595. & 614. *Dugdale*, Baronage, vol. 1. p. 80. 81. It appears, that his wife was the neareſt heir to the earldom; for Sir James Dalrymple, Hiſtorical Collections, p. 376. obſerves, "That Johanna, the daughter of Maliſe Earl of Strathern, "was forfaulted for marrying the Earl of Warren, an enemy to the King and kingdom." It muſt be plain to every reader, that Dugdale runs into confuſion about the different wives of Earl Warren; at the ſame time, it is not to be diſſembled, that both the exiſtence and the forfeiture of Johanna depend upon the authority of Sir James Dalrymple. According to his general cuſtom, he neglects to produce the evidence of his aſſertion; yet his narrative is ſo circumſtantial, and his reputation for integrity is ſo well eſtabliſhed, that the fact may be preſumed probable, if not certain. Be this as it will, it does not vary the argument of the claimant. Every thing relating to Johanna is included within *crotchets*, leſt the claimant ſhould ſeem to aſſert more than ſhe can prove.

have

Strathern. Between 1370 and 1414.

have left iſſue a daughter, Johanna, who forfeited for "having "married Earl Warren, an enemy of the King and kingdom (*d*)."]

David II. having recovered poſſeſſion of his kingdom, beſtowed the earldom of Strathern, now in the crown by [a double] forfeiture, on Sir Maurice Murray, the nephew and heir of Maliſe, 7th Earl of Strathern, and on the heirs-male of his body; whom failing, to return to the crown (*e*).

Maurice Earl of Strathern was ſlain at the battle of Durham in 1346 (*f*).

He left no iſſue: the earldom devolved on the crown. David II. beſtowed it on his nephew Robert, Steward of Scotland, afterwards Robert II. He took the ſtyle of *Earl of Strathern* (*g*).

Robert II. at his acceſſion to the crown, granted a charter of the

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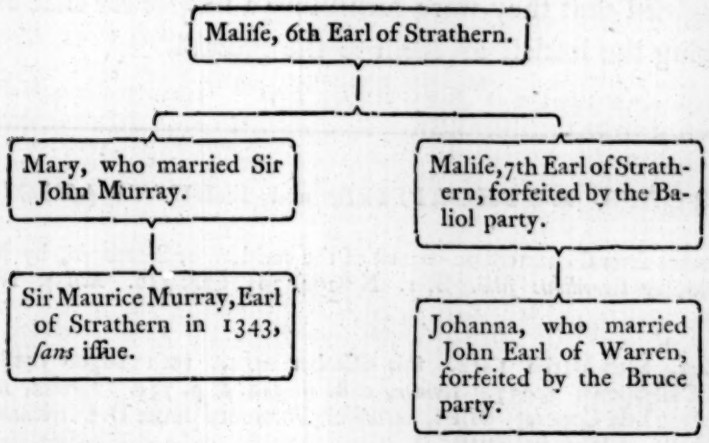
PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*d*) *Sir James Dalrymple*, as above, at note (*c*).

(*e*) Original charter 1343, in the poſſeſſion of Murray of Abercairnie. *Sir James Dalrymple, ibid.* This Maurice Earl of Strathern is witneſs to the charter by David II. erecting the earldom of Sutherland into a regality. *Charter*, 10th October, anno regni 17. 1347. The pedigree of the family of Strathern will appear from the following table.



(*f*) *Fordun*, l. 14. c. 3.

(*g*) *Sir James Dalrymple*'s Collections, p. 376. There are many charters extant, granted by Robert the Steward, under the title of *Earl of Strathern.*

earldom

Strathern. Between 1370 and 1414.

earldom of Strathern to his younger ſon, David. Much argument has been founded upon this charter, and therefore it ſhall be here recited. It grants "David Seneſcalli, Militi, comitatum de Strath-"ern, cum pertinen. Tenend. et habend. *ſibi, et hæredibus ſuis*, in "omnibus, et per omnia, juxta formam et tenorem chartæ ſibi ex-"inde confectæ; et adeo liberè, &c. ſicut quondam Maliſius Co-"mes de Strathern, vel aliquis alius Comes ejuſdem, ipſum comi-"tatum, cum pertinen. aliquo tempore liberiùs tenuit ſeu poſſedit," &c. Then follows a grant of regality (*h*).

At what time David Earl of Strathern died, is uncertain. He left iſſue an only daughter, Euphame, *Counteſs of Strathern*, married to Sir Patrick Graham. She and her huſband were ſtyled *Earl and Counteſs of Strathern*, in many deeds, public as well as private (*i*).

Euphame was ſucceeded by her ſon Maliſe: he is ſtyled *Earl of Strathern* when he became an hoſtage for James I. (*k*).

On the return of James I. a ſtatute was enacted for inquiring what lands belonged to the crown at the demiſe of Robert I. or at any time ſince that period, comprehending no leſs than *ninety-four years*; and the King was impowered to call for the production of all "char-"ters and evidents (*l*)."

When the Scottiſh nobles concurred in enacting this law, they little imagined that they were furniſhing a handle for that axe which might bring the loftieſt of them to the ground.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*h*) There are ſeveral charters on record of the earldom of Strathern, by Robert II. to his ſon David, *et hæredibus ſuis*. B. 1. N° 294. 303. 304. 310. *Roll* 4. N° 4. *Rymer*, t. 7. p. 345.

(*i*) *Charters*, 28th March 1414. 8th October 1414. 10th Auguſt 1418. *Sir James Dalrymple*'s Collections, p. 377. *Rymer*, t. 8. p. 544. & p. 735. *Fordun*, lib. 15. c. 23. "Joh. Dromond de Concrag, Miles, interfecit dominum ſuum D. Patricium de Graham, "*Comitem de Stratherne*, inſidioſè."

(*k*) *Rymer*, t. 10. p. 309.

(*l*) Act 9. parl. 1. James I. 1424.

In

Strathern. Between 1370 and 1414.

In the courſe of his inquiries, the King turned his attention to the earldom of Strathern, under pretence, as is ſaid, that it was *a male fee*. He diveſted Maliſe (*m*), and conferred the earldom for life on Walter Earl of Athole, his uncle (*n*).

To Maliſe he granted the lands of Craynis, &c. He erected thoſe lands " *into the earldom of Menteth*, to be held in a *free earldom* by " Maliſe, and *the heirs-male lawfully procreated or to be procreated of* " *his body*; whom failing, to return to the crown (*o*)."

Accordingly Maliſe was, at his releaſe from captivity in England, ſtyled *Maliſius Comes de Menteth* (*p*).

James I. in his attempts to humble the ariſtocracy, always did too much, or too little. This was probably owing to his ſituation. His plans were boundleſs; his power of execution limited.

By his diſpoſal of the earldom of Strathern, he exaſperated the relations of the young, inoffending, and abſent Maliſe; yet he did not conciliate the favour, nor remove the ſuſpicions, nor ſatiate the ambition of Athole. The fatal conſequences are well known. The

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*m*) *Buchanan*, lib. 10. c. 48. In making anſwers to Sir Robert Gordon's objections, there will be occaſion to examine this fact.

(*n*) *Record* Charters, b. 2. N° 88. *pro toto tempore vitæ ſuæ.*

(*o*) Charter, 6th September 1427. " Quas quidem terras, cum pertinen. *in liberum co-* " *mitatum de Menteth*, conſtituimus, ordinamus, et de novo erigimus; tenend. et habend. " præfato Maliſio, et *hæredibus ſuis maſculis de corpore ſuo legitimè procreatis ſeu pro-* " *creandis*; quibus fortè deficientibus, nobis et ſucceſſoribus noſtris liberè revertendas, " de nobis et hæredibus noſtris *in liberum comitatum de Menteth* in feodo et hæreditate, " &c."

(*p*) *Rymer*, t. 11. p. 339. It may be obſerved, in paſſing, that this example proves, that the ceremony of *belting* was not neceſſary in order to confer the title of *Comes*. Maliſe, while abſent from Scotland, could not be *gladio cinctus comitatûs*. There is an appoſite example of this in *Memoriale patris Gualteri de Coventre*, apud *Leland*. Collectanea, vol. 1. p. 293. " Johannes Rex [1198] die coronationis ſuæ, accinxit Gul. Mareſcallum gladio " comit. de Striguil, et Gaufridum Petri gladio comitatûs de Eſſex, qui, licet ante vocati " eſſent Comites, et adminiſtrat. comit. ſuorum habuiſſent, non tamen erant accincti gla- " dio comitatûs."

Strathern. Between 1370 and 1414.

King fell a victim to his own great, but impracticable undertaking, and his reign ſet, as it roſe, in blood.

After two centuries had elapſed, William Earl of Menteth was ſerved neareſt heir of blood to Euphame Counteſs of Strathern, and to David Earl of Strathern, her father. In conſequence of this, Charles I. by patent ratified the ſervice and the title of honour to the Earl of Menteth, in virtue of the charters granted by Robert II. to David Earl of Strathern, and *his heirs* (*q*).

The ſervice and the patent were afterwards called in queſtion, and ſet aſide by Charles I. This happened from reaſons of ſtate, explained by our hiſtorians (*r*). It is remarkable, that they were ſet aſide, not upon this erroneous reaſon in law, That a grant *hæredibus ſuis* implied a limitation to *heirs-male*; but upon a reaſon in fact, equally erroneous, That David Earl of Strathern died without iſſue (*s*).

OBJECTION.

p. 20. Here Sir Robert Gordon obſerves, "That the land-eſtate of the "earldom of Strathern ſtood limited *hæredibus ſuis*; that is, *to heirs-* "*male*; and failing them, to return to the crown: That the peerage "*muſt have become extinct* upon Earl David's death; but his daugh-

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*q*) *Record* Charters, b. 53. N° 48. 31ſt July 1631. "*Virtute chartarum* per dict. "quond. Regem Robertum II. conceſſ. præfato quondam Davidi Comiti de Strathern, *ſu-* "*iſque hæredibus.*" This ſerves to ſhew, that the miniſters of Charles I. conſidered the charters of the earldom of Strathern to be equivalent to what, in later ages, was conceived in the form of a patent of honour.

(*r*) "William Earl of Menteth having ſerved heir to David Earl of Strathern, obtain- "ed a patent for the earldom, with the precedency of David Stewart Earl of Strathern. "But this title of Strathern was recalled, more from a miſtake in our hiſtorians, aſſerting "Euphame Roſs [the mother of David Earl of Strathern] to be the firſt wife of Robert II. "than any ſolid ground;" *Sir James Dalrymple*'s Hiſtorical Collections, p. 377. See alſo a cotemporary, though no courtly hiſtorian, *Scotſtarvet*, p. 140. 157. He mentions ſome words which dropt from the Earl of Menteth, bordering upon treaſon.

(*s*) *Durie*'s Deciſions, 20th and 22d March 1633, p. 682. 683. *Sir James Dalrymple*, as above.

"ter,

" ter, niece to the Duke of Albany, Regent, poſſeſſed of the great family- Strathern.
" eſtate, and *repreſentative of the family*, could not have difficulty to Between 1370
" procure a *renewal of the extinct peerage* to her huſband; and ac- and 1414.
" cordingly he, and his ſon Maliſe, appear to have been *Earls of Strath-*
" *ern*. But when James I. underſtood that the family-eſtate, which,
" by the limitations in the inveſtitures, ought to have returned to the
" crown, was in the hands of Maliſe, whoſe mother had no right to it,
" he took the eſtate from Maliſe; but afterwards, to *make him repara-*
" *tion*, beſtowed upon him the earldom of Menteith, and created him
" Earl of Menteith, and gave the eſtate and peerage of Strathern to
" the Earl of Athole; the latter probably *with the conſent of Maliſe*."

ANSWER.

In ſtating thoſe objections, Sir Robert greatly errs; and even argues againſt his own principles.

1. That a clauſe, *hæredibus ſuis*, in 1370, implied a limitation to *heirs-male*, has been already proved an error in law and hiſtory.

2. If, as Sir Robert argues, females were excluded from ſucceſſion, how could Euphame be *repreſentative* of the family?

3. There is no evidence that David Earl of Strathern ſurvived his brother Robert III.; and conſequently there is no evidence that the earldom had not returned to the crown, by Sir Robert's hypotheſis, before the Duke of Albany became regent.

4. It is a miſtake to ſuppoſe, that Euphame, by being the niece of the Duke of Albany, had any intereſt with him. There was no harmony between the children of Eliſabeth Muir and the deſcendents of Euphame Roſs.

5. Sir Robert preſumes a creation by a regent; which is in itſelf improbable; and which is alſo inconſiſtent with the Earl of Menteith's ſervice, in 1630, to Euphame Counteſs of Strathern. If the peerage had not been in her, a ſervice to her was not the method of tranſmitting it. The ſervice ought to have been to Sir Patrick Graham, her huſband.

6. The nature of the reſumption by James I. is ſtated from Buchanan, lib. 10. c. 48. " Meliſſus Gramus a Rege, dum in publicum patrimonium *diligentius* " *inquirit*, Iernià eſt ſpoliatus; quod eam comperiſſet avo ejus materno eâ lege " datam, ut, deficiente ſtirpe maſculâ, ad Regem rediret; feudumque eſſet " maſculinum, ut interpretes juris nunc loquuntur." The expreſſions of Buchanan are intentionally ambiguous, and may imply, either that James I. acted according to law, or violently, and with injuſtice. It is hardly poſſible to ſuppoſe, that James I. could have reſumed the earldom upon the pretence that *hæredes ſui* implied a limitation to *heirs-male*. Had that been the caſe, the charter of Menteith granted to Maliſe would have been conceived *hæredibus ſuis*, inſtead of being anxiouſly conceived to *heirs-male of the body of Maliſe*.

The pretext for the reſumption ſeems to have been this. It has been held, that the expreſſion *hæredes ſui*, though implying *heirs-general*, may, from circumſtances, be ſo underſtood as to introduce a limitation to *heirs-male*. By the charter to David Earl of Strathern, the earldom was to be held *as it had been held by Earl Maliſe*. Now, as Sir Maurice Murray, the heir-general of Earl Maliſe,

Strathern. Between 1370 and 1414. Maliſe, accepted a charter of the earldom directly from David II. it might be argued, that this imported an acknowledgement on his part, that the ancient earldom had ſtood limited to heirs-male. James I. and his miniſters, might have paſſed over the circumſtance, that [both] Earl Maliſe [and his daughter Johanna] having forfeited, Sir Maurice Murray could only take by grant from the crown, and not of right.

Be this as it will, the reſumption of the earldom of Strathern by James I. was certainly regarded as a violent meaſure, and its conſequences were dreadful.

7. If Maliſe Graham had no right to the earldom, what is meant by the King's *making reparation to him*, or his *conſenting* to the grant in favour of the Earl of Athole? Beſides, there is neither proof nor preſumption offered for eſtabliſhing this extraordinary conſent.

8. Sir Robert ought not to have diſtinguiſhed between the granting the earldom of Menteith to Maliſe Graham, and the creating him an Earl. It is plain, that both were effected by the ſame deed, the charter 6th September 1427.

SECT. XIV.

BUCHAN, 1551.

Buchan. 1554. THIS inſtance of female ſucceſſion in titles of dignity ſeems perfectly concluſive; and therefore it will be proper to make a full recital of all the circumſtances of the caſe.

Lady Jane Somerſet, the heroic Queen of James I. (*a*), married a brother of Stewart Lord Lorn. By him ſhe was the mother of Sir James Stewart.

James III. beſtowed the earldom of Buchan on this Sir James Stewart (*b*).

The original grant is not now extant. It is however referred to in a ſubſequent charter granted by James III. of the earldom of Buchan, " to James Earl of Buchan, and the heirs-male of his body;

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*a*) When the aſſaſſins burſt into his chamber, ſhe oppoſed herſelf to their daggers; when he was ſtruck to the ground, ſhe threw herſelf upon his body, and before ſhe could be forced away, was twice ſtabbed by the murderers of her huſband.

(*b*) *Sir James Dalrymple*, Hiſtorical Collections, p. 365. and all our genealogiſts.

" whom

" whom failing, to return to the Sovereign (*c*)." This charter proceeds on the Earl's own reſignation. Buchan. 1531.

Seiſin or livery of the earldom of Buchan was accordingly given to this James Earl of Buchan, *ſuper montem de Ellane* (*d*), afterwards called *Earlſhill*. 1476.

James was ſucceeded by his eldeſt ſon Alexander, and Alexander by his ſon John. This John was ſeiſed in *the earldom of Buchan, and Earlſhill thereof*, as neareſt heir ſerved and retoured to his father Alexander (*e*). 1519.

Hitherto the earldom of Buchan, in the deſcendents of Sir James Stewart, was a male fee, ſtanding limited to heirs-male.

But John, 3d Earl of Buchan, upon his own reſignation, obtained a charter of his whole eſtate, lordſhip, baronies, heritable offices, and of the *Earlſhill*, in favour of John Stewart, his ſon and heir-apparent, *et hæredibus ſuis*, with reſervation of the father's liferent (*f*). 1547.

A few days after, John the ſon was killed at the battle of Pinky, in the lifetime of his father, and before taking infeftment on the charter 1547. He left an only child, a daughter, Chriſtian. By virtue of a royal precept under the quarter-ſeal, ſhe was infeft in the eſtate, heritable offices, &c. contained in the charter 1547, as heir to her father (*g*). Sept. 10. 1547. 1551.

After this, ſhe granted charters to the vaſſals of the family, under

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*c*) " Jacobo Comiti Buchaniæ, et hæredibus ſuis maſculis de corpore ſuo legitimè procreatis ſeu procreandis; quibus fortè deficien. nobis, hæredibus et ſucceſſoribus noſtris liberè reverten." *Record Charters*, b. 8. N° 35.

(*d*) *Atteſtation by the ſheriff of Aberdeen*, 28th October 1476.

(*e*) *Inſtrument of ſeiſin*, 29th Auguſt 1519.

(*f*) *Record Charters*, 4th Auguſt 1547, b. 30. N° 139.

(*g*) *Inſtrument of ſeiſin*, 14th, 15th, and 16th, July 1551.

Buchan. 1551. the title of " Fiar of all and whole the earldom of Buchan (*h*)."

If *hæredes ſui*, in the charter 1547, meant *heirs-male*, not *heirs-general*, the royal precept and ſeiſin, and grants made by Chriſtian, were all erroneous; for that, at that time, John Earl of Buchan had another ſon, *James*, the uncle of Chriſtian. He, however, ſo far from pretending any right to the earldom of Buchan, in preference to Chriſtian, did acknowledge her right, even during the life-time of his father and her grandfather.

He entered into a contract for marrying her to James Commendator of St Andrew's, afterwards known in hiſtory by the name of *Regent Moray*. In this contract he ſtyles himſelf " James Stewart, ſe-" cond ſon to John Earl of Buchan, and appeirand heir [i.e. heir-" preſumptive] to Chriſtian Stewart, dochter and heir to John Ma-" ſter of Buchan (*i*)."

According to Sir Robert Gordon's hypotheſis, he ought to have ſtyled himſelf " John Maſter of Buchan, fiar of the earldom of Bu-" chan."

This James had a ſon alſo called *James*, who was ſerved and retoured heir-male to his father, to his grandfather John Earl of Buchan, to his great-grandfather Alexander Earl of Buchan, and to his great-grandfather's father James Earl of Buchan; yet in all thoſe retours he is ſtyled *James Stewart* ſimply (*k*).

According to Sir Robert Gordon's hypotheſis, he ought to have been ſtyled " James Stewart Earl of Buchan."

After the death of John Earl of Buchan, her grandfather, Chriſtian was univerſally called *Counteſs of Buchan* (*l*). This is one of

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*h*) *Charter*, 1ſt July 1555, by Chriſtian Stewart, " filia et hæres quondam Johannis " Stewart Magiſtri de Buchan, feoditaria totius et integri comitatûs de Buchan."

(*i*) *Contract*, 16th January 1549.

(*k*) *Record Retours*, B. 7. p. 45. &c.

(*l*) *Lord Ochiltree* and *Sir James Balfour*. MS. Collections, Advocates Library, Edinburgh.

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the few facts averred by Lady Eliſabeth which Sir Robert Gordon does not controvert. Buchan. 1551.

She married Robert Douglas, ſon of Sir Robert Douglas of Loch-leven, brother-uterine of Regent Moray: he thereupon aſſumed and bore the title of *Earl of Buchan* (*m*).

A royal charter of the family-eſtate, heritable offices, and the *Earlſhill*, was granted to Robert Douglas Earl of Buchan, and Chriſtian Stewart Counteſs of Buchan, his wife, in conjunct fee, "and "to the heirs-male of the marriage;—to the eldeſt heir-female of "the marriage;—to the heirs of the body of the ſaid Dame Chri-"ſtian; and laſtly, to the neareſt lawful heirs whatſoever of the ſaid "Earl (*n*)." 1574.

Of this marrriage there was a ſon, James. He, under the name of *James Douglas*, obtained himſelf ſerved neareſt and lawful heir of Robert Earl of Buchan his father (*o*). 1583.

But afterwards, having obtained himſelf ſerved neareſt and lawful heir of Chriſtian Stewart Counteſs of Buchan, his mother, he was ſtyled "James *now* Earl of Buchan (*p*)." 1588.

SECT. XV.

BUCHAN, 1606.

THIS James died, leaving an only child, a daughter, *Mary Douglas Counteſs of Buchan*. Buchan. 1606.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*m*) *Anderſon*'s Hiſtorical Collections, vol. 2. p. 228.

(*n*) *Record Charters*, 7th April 1574, B. 34. N° 123. "Et hæredibus maſculis inter "ipſos legitime procreat. ſeu procreand.; quibus deficient. ſeniori hæredum femine-"rum, abſque divisione, inter ipſos legitimè procreat. ſeu procreand.; quibus deficien. hæ-"redibus de corpore dictæ Dominæ Chriſtinæ legitimè procreand.; quibus deficien. legiti-"mis et propinquioribus hæredibus dicti Comitis quibuſcunque."

(*o*) *Service*, 2d April 1583.

(*p*) *Service*, 24th May 1588.

In

1606. In 1606, certain commiſſioners appointed by James VI. pronounced a decree for ranking the nobility of Scotland. In it *the Counteſs of Buchan* is ranked after the Earl of Glencairne (*a*).

This Mary Douglas, Counteſs of Buchan, obtained herſelf infeft,
1615. as neareſt and lawful heir of Chriſtian Stewart Counteſs of Buchan, her grandmother, in ſeveral baronies, and eſpecially in the lands of *Earlſhill* (*b*).

She married James Erſkine ſon of the Earl of Marr: he thereupon aſſumed the title of *Earl of Buchan.*—On the reſignation of the
1617. Counteſs, with his conſent, a royal charter of the earldom of Buchan was granted to "Mary Douglas Counteſs of Buchan, and her huſ-"band, in conjunct fee and liferent, and to the longeſt liver of "them, and the heirs-male of their marriage;—to the neareſt lawful "heirs-male, and aſſignees whatſoever, of the ſaid James Earl of "Buchan."

This charter contains a *Novodamus*; and, in concluſion, this clauſe. "And we decern and ordain, and for ourſelves, and our ſucceſſors, "we declare, that James Earl of Buchan, and his heirs-male fore-"ſaids, ſhall exerce [or enjoy] and poſſeſs, in all our parliaments, "conventions of eſtates, and others our public ſervices, all honours, "dignities, and precedencies, which the Earls of Buchan of old "exerced or poſſeſſed in any time paſt (*c*)."

This additional clauſe to the charter had become neceſſary, by rea-

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*a*) Decreet of ranking, 1606.

(*b*) Inſtrument of ſeiſin, 7th, 8th, and 9th, November 1615.

(*c*) *Record Charters*, 22d March 1617. B. 48. N° 390. "Hæredibus maſculis inter ip-"ſos legitimè procreat. ſeu procreand.; quibus deficien. legitimis et propinquioribus hæ-"redibus maſculis ac aſſignatis dicti Jacobi Comitis Buchaniæ.—Ac decernimus et ordi-"namus, et pro nobis ac ſucceſſoribus noſtris declaramus, quod præfatus Jacobus Comes "Buchaniæ, et hæredes ſui maſculi prædict. exerceant et poſſideant in omnibus noſtris "parliamentis, ſtatuum conventionibus, aliiſque noſtris publicis ſervitiis, omnes honores, "dignitates, et præeminentias, quas Comites Buchaniæ ex antiquo exercuerunt ſeu poſſi-"derunt ullo tempore præterito."

ſon

ſon of the practice now introduced, of conferring titles of dignity ſeparate from, and unconnected with, the land-eſtate. Buchan. 1606

In 1625, this Earl and Counteſs of Buchan obtained a new charter of the earldom of Buchan, with the *honours and dignities* thereunto belonging, in favour of themſelves in liferent, and their eldeſt ſon in fee, and the heirs-male of his body; which failing, to return to the ſaid James Earl of Buchan, and the heirs-male between him and Mary Douglas Counteſs of Buchan; which failing, to the neareſt lawful heirs-male, and aſſignees whatever, of the ſaid James Earl of Buchan (*d*). 1625.

After this, Mary Douglas Counteſs of Buchan was ſerved neareſt heir to James Earl of Buchan her great-great-great-grandfather, to John Earl of Buchan her great-great-grandfather, and to John Maſter of Buchan her great-grandfather (*e*).

Upon theſe titles a decreet of the court of ſeſſion was obtained by her, as heir immediately by progreſs to James 1ſt Earl of Buchan, and by "James Earl of Buchan her ſpouſe; who is heritably infeft in the "earldom of Buchan, &c. *with the honours, dignities, titles, and pri-* "*vileges, of the ſame, upon the reſignation of the ſaid Dame Mary Dou-* "*glas, Counteſs of Buchan, his ſpouſe* (*f*)."

This decreet is pronounced againſt the Earls of Eglintoun, Montroſe, Caſſilis, Caithneſs, and Glencairn. It reduces the decreet of ranking 1606; whereby thoſe Earls had precedency allotted to them before the ſaid Dame Mary Douglas and her huſband. It eſtabliſhes the precedency of Buchan, and ſets aſide all charters, infeftments, creations of dignity, &c. inconſiſtent therewith, of which the five Earls, in their own right, or in that of their predeceſſors, "*by the* "*father or mother's ſide*," might be poſſeſſed.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*d*) *Record Charters*, 25th November 1625, B. 51. N° 80.

(*e*) *Services*, 29th September 1627.

(*f*) *Decreet*, 25th July 1628.

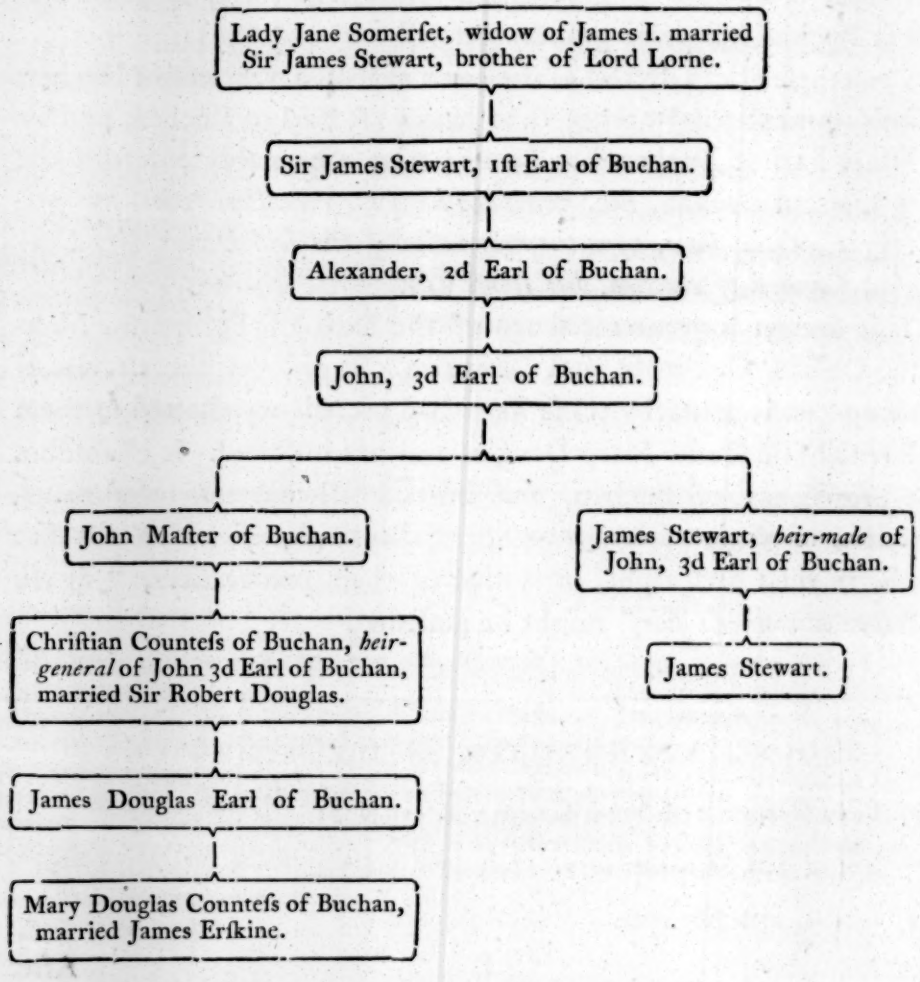
Buchan. 1606 After the death of the Counteſs of Buchan, this decree was ratified by act of parliament (*g*).

OBJECTION, as to Buchan 1551.

It is pitiful to ſee how Sir Robert Gordon ſtruggles to diſengage himſelf from this complicated inſtance of female ſucceſſion in titles of honour.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*g*) *Record*, act of parliament, 20th June 1633.——That the two inſtances in the ſucceſſion of Buchan may be more eaſily underſtood, a pedigree of the family is ſubjoined.



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p. 32. 1. As to Chriſtian Stewart, he admits that ſhe took the title, though only *heir-general* of John Earl of Buchan; and that it does not appear that James, though the *heir-male*, ever took it; "whether on account of "his not having the family-eſtate, he was indifferent about it, or upon "what other account, cannot at this diſtance of time be known." Buchan.

2. Chriſtian aſſumed the title for ſome time, and her huſband continued a commoner. For this he quotes precept of appriſing, 20th December 1563, "Quæ fuerunt Chriſtinæ Comitiſſæ de Buchan, *et Ma-*"*giſtri Roberti Douglas*, ejus conjugis, pro ſuo intereſſe." He adds, "But afterwards, to ſecure the peerage, her huſband got a creation "from his brother-uterine, Regent Moray, and ſat in parliament 1567. "He is deſigned *Earl of Buchan* in 1574, and ſat in parliament 1579. "This creation of the huſband ſhews that Chriſtian could not be Count-"eſs in her own right."

ANSWER.

1. When the *heir-general* aſſumes a title, and when that title is acknowledged by the crown, and by every one elſe, and when, at the ſame time, the *heir-male* makes no pretenſions to the title, the obvious preſumption is, that the *heir-general* has right to the title, and that the *heir-male* has not.

But it is conjectured, "That the heir-male was indifferent about the peerage, "becauſe he took not the family-eſtate." This is juſt the excuſe made by *Douglas*, in his Peerage, for the heir-male of Lennox, in ſimilar circumſtances, and will ſerve equally well for any heir-male in ancient times.

It would ſeem, however, that this heir-male was as indifferent about the family-eſtate as about the title. The charter 1547 was *hæredibus ſuis*, without the addition of the magical word *quibuſcunque*; the eſtate therefore, according to Sir Robert Gordon, ſtood limited to *heirs-male*; yet the heir-male claimed it not. And as he did not claim the eſtate, it is not ſtrange that he did not claim the title!

2. Sir Robert admits, that Chriſtian Stewart was called *Counteſs*; but he accounts for this, by obſerving, that "ſhe *aſſumed* the title." He ought to have added, as his argument required, "without any lawful pretenſions for ſo do-"ing."

It may be remarked, in paſſing, that the precept of appriſing 1563 is not concluſive any way. That one of Sir Robert Douglas's creditors gave him the name of *Robert Douglas* ſimply, will not determine what title he did bear, or was by cuſtom authoriſed to bear; and indeed, for the ſame reaſon, the ſtyle of *Counteſs of Buchan*, there given to Chriſtian Stewart, would not certainly determine what title ſhe herſelf took.

Sir Robert adds, that "afterwards, to ſecure the peerage, her huſband got "a creation from his brother the Earl of Moray, Regent."

The claimant will elſewhere have occaſion to inquire, how far the Regent *could* beſtow a title of honour. *Here* it is ſufficient for her to obſerve, that he *did not* beſtow it on his brother.

It is perfectly clear that Robert Douglas was not created Earl of Buchan by Regent

Buchan. Regent Moray. We know from the Statute book, that, on the 24th July 1567, the ill-fated Mary yielded up the reins of government, which ſhe could no longer hold, and appointed the Earl of Moray Regent. Moray at that period was abſent from Scotland, and did not accept of her nomination till 22d Auguſt 1567; *Anderſon*, vol. 2. p. 251. *His title was not ratified in parliament till the 25th of December* 1567. See *Statute book*. The Earl of Buchan was one of the Lords who ratified it.

Nevertheleſs Sir Robert Gordon, with the Statute book lying open before him, aſſerts, that the Earl of Buchan was created a peer by Regent Moray; by that very perſon whoſe authority *he* contributed to ratify. With more propriety it might be ſaid, that the Earl of Buchan made Moray regent, than that Moray made him a peer.

Such being the true ſtate of the caſe, it is needleſs to examine the force of Sir Robert Gordon's argument, "That Chriſtian could not be Counteſs in her own "right, *becauſe* her huſband was created an Earl." It may ſuffice to obſerve, that, by the ſame mode of reaſoning, in the laſt century, Lady Anne Hamilton was not a Ducheſs.

OBJECTION, as to Buchan 1601.

p. 32. "Mary Douglas having the family-eſtate, was anxious to have the peer-
"age alſo. With this view ſhe aſſumed the title, hoping thereby to make
"it believed that ſhe got the peerage by female deſcent from her grandmo-
"ther Chriſtian. Her huſband, James Erſkine, the Lord Treaſurer's ſon,
"was created Earl of Buchan by a charter, 22d March 1617, to him, and
"his heirs-male by the heireſs of Buchan; but being conſcious of the right
"of the heir-male of John Earl of Buchan, and afraid leſt he ſhould make
"claim to the ancient peerage, they procured a revival of that peerage,
"with the concurrence of the heir-male, thereby validating their right."

ANSWER.

This ſolution is in every reſpect ingenious. 1. It is admitted, that Mary Douglas took the title of Buchan many years before her marriage; and it muſt be admitted, that ſhe was ranked in 1606 as *Counteſs of Buchan*.

She was anxious to get the peerage, and with this view aſſumed the title; and yet, in 1606, when that title was given her in judgement, ſhe was an infant. This is a fact which cannot be diſputed.

Hoping to make it be believed that ſhe got the peerage by female deſcent from her grandmother. Who could ever be perſuaded into ſuch belief, if Robert Douglas had been created Earl of Buchan by Regent Moray not forty years before? Was the memory of ſuch recent tranſactions ſo ſoon obliterated?

There is an inſinuation added, as if the title of Buchan had been turned out of the right channel by means of the power of the Earl of Marr, *Lord High Treaſurer*. This is a high-ſounding name, and meant to convey an idea of power like that of Burleigh or Saliſbury; but the truth is, that the office at that time was

was of no public importance. The Earl of Marr had no influence in adminiſtration after the acceſſion of James to the crown of England; and had he had influence, his character would have placed him above the ſuſpicion of employing it to diſhonourable purpoſes. Buchan.

The concurrence of the *heir-male* is miſunderſtood. It has no relation whatever to the peerage. It probably reſpects ſome pretenſions he might have to the reverſion of wadſets, or other incumbrances on the family-eſtate. Sir Robert Gordon might as well contend, that the Earl of Marr and his wife had a right to the ancient peerage of Buchan; for that their conſent to the charter of the lands, is obtained in the ſame manner as that of the heir-male.

It may now be proper to exhibit a chronological ſeries of the earldoms in 1284, which deſcended to heirs-general, and were poſſeſſed by heirs-general.

Marjory Counteſs of Buchan married Sir William Cumin of Tindail. Buchan, before 1214.

Iſabel Counteſs of Athole married Thomas de Gallovidia. Athole. 1231.

Fernelith Counteſs of Athole married David de Haſtings. —— 1242.

Adda Counteſs of Athole married John de Strathbogie. —— 1269.

Matildis Counteſs of Angus married, 1. John Cumin; 2. Gilbert de Umfraville. Angus. 1242.

N—— Counteſs of Menteith married William Cumin. Menteth, before 1257.

N—— Counteſs of Menteith married Walter Stewart Balloch. —— 1257.

Margaret Counteſs of Carrick married Robert de Brus. Carrick. 1270.

Euphemia Counteſs of Roſs married, 1. Sir Walter Leſley; 2. Alexander Stewart Earl of Buchan. Roſs. 1375.

Margaret Counteſs of Roſs married Donald Lord of the Iſles. —— 1410.

Iſabel Counteſs of Fyfe married, 1. Sir William Ramſay; 2. Sir Thomas Biſſet; 3. Walter Stewart. Fyfe, between 1350 & 1359.

Margaret Counteſs of Marr married, 1. William Earl of Douglas; 2. being divorced from him, Sir John Swinton. Marr. 1379.

Iſabel Counteſs of Marr married, 1. Sir Malcolm Drummond; 2. Alexander Stewart, the baſtard of Buchan. —— 1388.

Robert Lord Erſkine, the heir-general of Iſabel Counteſs of Marr. —— 1435.

Margaret Counteſs of Lennox married Walter de Faſlane. Lennox. 1384.

In this catalogue the claimant has omitted the " heirs-general" who, in after times, ſucceeded to earldoms, of the ſame name indeed with thoſe in the record 1284, but which had fallen to the crown by forfeiture, and had been erected anew; ſuch as,

Angus. 1377. Margaret Counteſs of Angus, married, 1. Thomas Earl of Marr; 2. William Earl of Douglas.

Strathern. 1414. Euphame Counteſs of Strathern, married Sir Patrick Graham.

Buchan. 1551. Chriſtian Counteſs of Buchan, married Robert Douglas.

—— 1601. Mary Counteſs of Buchan, married James Erſkine.

It remains only to be obſerved, that among the Earls who appear in the record 1284, there are *two* " heirs-general," and *three* the huſbands of Counteſſes, viz.

1. Gilbert de Umfraville, the ſon of Matildis Counteſs of Angus.
2. Alexander de Cumin, the ſon of Margaret Counteſs of Buchan.
3. John de Strathbogie, the huſband of Adda Counteſs of Athole.
4. Walter Stewart Balloch, the huſband of N—— Counteſs of Menteith.
5. Robert de Brus, the huſband of Margaret Counteſs of Carrick.

THUS has the claimant examined the hiſtory of the *ten* ancient earldoms appearing upon the record 1284; and ſhe has ſhewn that *nine* of them deſcended to *heirs-general.* If the preſent controverſy is to be determined by cuſtom and analogy, the claimaint may juſtly conclude, that the *tenth* earldom alſo was deſcendible to " heirs-" general;" and therefore that ſhe, under the character of *heir-general,* is intitled to the honours of Sutherland.

CHAP.

CHAP. VI.

Examination of *the Reaſons of Preference* urged by Sir Robert Gordon.

INTRODUCTION.

IF the propoſitions laid down in the five preceding chapters have been proved, it follows, that Eliſabeth Sutherland took the honours of Sutherland as *heir-general* of Earl John.

And if ſhe ſo took the honours, the claimant, Lady Eliſabeth, is in like manner intitled to take them, being not only the heir-general of Earl John, but the heir of the body, and the heir-general, of Eliſabeth Sutherland.

Reaſons of preference are urged by Sir Robert Gordon, and *here* is the proper place for examining them.

His *firſt* reaſon is thus expreſſed: "*When the limitation of the peer-* p. 16.
"*age appears in the inſtrument of creation*, that *muſt regulate every que-*
"*ſtion of ſucceſſion thereto: but when, by the loſs of the inſtrument, the*
"*limitation is unknown, the queſtion muſt be determined by legal pre-*
"*ſumption.*"

The preſumptions, "*That the limitation of the Sutherland peerage was*
"*not to heirs-female,*" are, according to Sir Robert, no fewer in number than *nine*.

They ſhall be ſeparately ſtated, and anſwers ſhall be made to each of them in their order.

General view of the FIRST PRESUMPTION for Sir ROBERT GORDON.

p. 16. Lady Eliſabeth admits, p. 2. of her caſe, "That the Thanes of Su- Reaſon I.
"therland were more ancient than the time of Malcolm the Third (*a*); and Preſumption 1.
"that

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*a*) In a note (*o*), *Supplemental Caſe*, p. 23. it is ſaid, "*One of the Lady Eliſabeth's tutors*
"has *lately* publiſhed ſome ingenious writings, to prove, that the laws of Malcolm II. are
"a

Reaſon I.
Preſumption 1.

" that the Earls of *Sutherland* were as ancient as the time of that prince. " As the former, they were feudal barons; as the latter, they were feudal officers; and both when the Feudal law was the governing law of " Scotland. The Books of Fiefs were written 120 years after the laſt " of theſe periods. By that law women were excluded from the ſucceſſion to fiefs of every kind, whether of land-eſtates or offices. Lady Eliſabeth has brought no inſtance of a female's holding a land eſtate in Scotland before the end of the twelfth century; and no authority from a law-book for female deſcent, even in land-eſtates, until the *Regiam Majeſtatem*, which all good antiquarians agree was " borrowed from *Glanville*; and conſequently could not have been " written before the fourteenth century; that is, three centuries after " the origin of the peerage in queſtion. But ſhe cannot bring rules of " deſcent from the thirteenth and fourteenth centuries to prove the limitations of a peerage which was created two or three centuries before theſe rules were thought of. Thus by the double relation of feudal vaſſal and feudal officer, the deſcent of the peerage in queſtion " muſt, from its original nature, have gone to heirs-male in excluſion " of heirs-female."

ANSWER.

This firſt preſumption contains much curious matter, which muſt be examined in detail.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

" a forgery; or, at leaſt, wrote at a later period. By the ſame mode of artificial argu- " ment, the claimant could prove, that *Magna Charta* was a forgery, or compoſed ſome " centuries after its date. The claimant hopes, and does not doubt of his cauſe being " judged by thoſe laws, which the lawyers, the judges, the parliament, and the people, of " Scotland, have held to be authentic above ſeven centuries."

In more ſimple language, this means, " That an hypotheſis, concerning *LL. Malcolmi*, has been framed with a view to the claim of the *heir-general* of Sutherland."

The perſon whom the note (*o*) honours with its cenſure would ill deſerve favour in the literary world, were *he* capable of framing an hiſtorical hypotheſis, with the view of ſerving any particular cauſe whatever. He does not underſtand what influence the *LL. Malcolmi* can have in the determination of the preſent queſtion: he is ſure, that, in treating of *them*, he had no view to *it*. He had long ago learned from Spelman, that *LL. Malcolmi* ought not to be aſcribed to Malcolm II.; and yet, from the ſtrain of the note (*o*), it would ſeem as if *he* had been the firſt writer who ever ventured to queſtion the authenticity of the laws of Malcolm II.

His arguments have been ſubmitted to the public judgement. They may ſeem artificial now; but they would have been within the comprehenſion of every ale-woman in the days of the Conqueror; for they chiefly turn upon the contents of a Saxon and a Norman ſhilling.

A diſſertation, proving, by ſimilar arguments, that *Magna Charta* is a forgery, will be a matter of more exquiſite learning. It is preſumed, that the learned author of this threatened tract knows, that the original of *Magna Charta* is extant, and that *the writing* of that age is aſcertained by certain rules of criticiſm.

Meanwhile it may be remarked, that this ardent zeal for *LL. Malcolmi* is ſomewhat ſingular, in a treatiſe where *Regiam Majeſtatem* is adjudged from David I. upon the authority of that Spelman who had denied *LL. Malcolmi* to be of the age of Malcolm II.

What

What Sir Robert Gordon calls an *admiſſion* on the part of the claimant, was thus expreſſed. "The Thanes of Sutherland are mentioned as early as the e- "leventh century; and the title of Thane was moſt probably converted into "that of Earl by Malcolm III. who began to reign in the year 1057, and firſt "introduced the title of Earl into Scotland." Reaſon I. Preſump. 1.

The claimant, in giving an account of the family of Sutherland, began at the earlieſt period where the common genealogical writers ſpeak of the ſtate of that country. She never meant to acknowledge that there was any genuine hiſtory of Scotland of a date ſo early. She could not admit, that the Earls of Sutherland were as ancient as the age of Malcolm III. nor could her admiſſion have made that to be fact, of which there is no evidence. The claimant ſuggeſted what ſeemed probable; at the ſame time ſhe added, "that it was impoſ- p. 2. "ſible to aſcertain, with preciſion, the pedigree of the moſt ancient Earls of "Sutherland; but that, from the year 1245, the pedigree is proved by unde- "niable evidence." In the pedigree annexed to her original caſe, ſhe mentioned *the ſuppoſition of family-hiſtories*. The latter part of her ſtate of the fact ought to have been ſet forth as well as the former.

If however Sir Robert Gordon, after inſpection of the moſt ancient writings in her poſſeſſion, ſhall be of opinion, that *Hugh Friſkin* was Earl of Sutherland, and that his ſon *Gulielmus Dominus de Sutherland* was at that time alſo Earl, the claimant is willing that *this* be held as the fact. If it is, Sir Robert Gordon muſt admit, that in the beginning of the thirteenth century, *Dominus de Sutherland* meant *Earl*, not *Laird*.

FIRST PRESUMPTION.

Upon the ſuppoſition that the *Earls of Sutherland* came in the place of the *Thanes of Sutherland*, Sir Robert Gordon, in the paſſage juſt quoted, and in the paſſages there referred to, argues thus.

p. 2. "When the Germans conquered the different provinces of the Roman "empire, the conquering prince parcelled out certain portions of the "conquered land among his chieftains, under a condition of military "ſervice, and attendance in council. Thoſe proprietors were in Scotland "called *Thanes:* they judged and led to war the people upon their e- "ſtates: from the nature of thoſe eſtates, they went to males; becauſe "males only could fulfill the condition upon which the grant had been "made.

"But the whole land of the conquered province was not ſo diſtributed. "Many of the ancient inhabitants kept their lands on the ancient allodial "footing; and ſuch of the new intruders as were not attached to any chief- "tain, taking poſſeſſion of vacant land, poſſeſſed it on the ſame footing. It "was neceſſary to reduce to ſubjection under government in a political, "thoſe who were not ſubjected in a feudal capacity; and therefore the "prince ſent his own officers to judge, and to lead to war the poſſeſſors "of thoſe lands. This officer in Scotland was called *Earl*. The office "had no connection with lands. At firſt it was during pleaſure; after- "wards it came to be made hereditary, and was granted, like all other

Reaſon I. Preſump. 1.

" grants of the time, in the feudal form, under a condition of military " ſervice, and of attendance upon the King's council. Thus an *Earl-* " *dom* went to heirs-male. 1*ſt*, Becauſe it was of the nature of a *Fief:* " 2*dly*, Becauſe it was of the nature of an *office*."

The capital concluſion from all this is, " That the *Thanes* of Suther- " land were feudal barons, the *Earls* of Sutherland feudal officers; and " that by the double relation of feudal vaſſal and feudal officer, the " deſcent of the peerage in queſtion muſt, from its original nature, " have gone to heirs-male, in excluſion of heirs-general." Q. E. D.!

ANSWER.

The claimant is unwilling to enter into this labyrinth of conjectures. She will proceed no farther than where ſhe has record to direct her.

Whether Sir Robert's ſyſtem be applicable to the ancient ſtate of the continent of Europe, ſhe has neither leiſure nor abilities to examine.

But with reſpect to the ancient ſtate of Scotland, his ſyſtem is improbable and erroneous.

His leading propoſition is, " That Sutherland was part of a Roman province " conquered by the Germans."

Where he made this diſcovery, is difficult to determine: nothing ſurely can be more improbable.

His deſcription of the nature of *Thanes* in Scotland, has no authority whatever to ſupport it. None of his numerous quotations, p. 2. make any mention of Scottiſh Thanes; unleſs perhaps it be the *Hiſtory of Feudal property*; and *that*, however reſpectable, is a very modern authority.

What was the nature of Thanes in ancient times, can only be learned from record. Sir Robert avers, " that they were chieftains, among whom the con- " quering prince parcelled out certain portions of the conquered land, under a " condition of military ſervice, and attendance at council."

He is left to reconcile his definition with the following ſtatute of David I. " Recordatio facta coram Domino Rege David apud Perth, per omnes judices. " —— De illis qui ab exercitu defuerunt, quod Rex debet habere *forisfactum* " *Comitum ſi Thani eorum remanſerint ab exercitu.* —— De omnibus verò " aliis qui ab exercitu remanſerunt, ſcilicet, de terris Epiſcoporum, Abbatum, " Baronum, Militum, *et Thanorum*, qui de Rege tenent, debet Rex ſolus ha- " bere forisfactum (*b*)."

Here there are perſons called *Thani Comitum*, and others *Thani*, holding of the King, and yet diſtinguiſhed from *Barones* and *Milites*.

In 1171, William King of Scots granted a renewal of the inveſtitures of Marr to Morgund the ſon of Gillocherus. It is addreſſed, " Univerſis Epiſcopis,

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*b*) In Skene's edition of the ancient books of law, this is printed among *Statuta Alexandri II.* c. 15. But in Lord Cromerty's MS. Adv. Library, it is among *Statuta David I.* ch. 24.

" Comitibus

" Comitibus, Abbatibus, Prioribus, Baronibus, Militibus, *Thanis*, et Præ- Reaſon I.
" poſitis, &c. (*c*)" Preſump. 1.

Thanes are here expreſsly diſtinguiſhed from *Barones* and *Milites*. This alſo is inconſiſtent with Sir Robert Gordon's definition of *Thanes*.

In a charter by Alexander II. mention is made of " Firmarii, vel *Thayni*, Præ-
" poſituræ de Kymyly (*d*)."

As to the *theory of Earls*, Sir Robert Gordon ſeems to ſpeak of times when the office of *Comes* was perſonal, and when a ſalary was beſtowed on him for his perſonal duty of judging the community in times of peace, and of heading them in war.

If he indeed ſpeaks of ſuch times, it would be a fruitleſs labour to inquire how a man, poſſeſſed of an office for the term of his life, with a ſalary depending on it, did tranſmit the office and the ſalary to his deſcendents. It would be juſt the ſame thing, as if one were at this day, to inquire *who* was the heir, male or general, of the chief juſtice of England, or of the auditor of the exchequer, in the office of chief juſtice or auditor.

With all his inquiries, Sir Robert Gordon has omitted to prove, that ſuch perſonal office of *Comes* ever exiſted in Scotland.

Nor will it eſcape obſervation, that in his preliminary diſcourſe, he expreſsly aſſerts, that the office of *Comes* had no connection with lands; and yet throughout his whole *Supplemental Caſe*, he always interprets *comitatus* to be a *land-eſtate*.

It may be true, that under the Saxon government in England, *Earls* were originally officers of ſtate, holding perſonal offices unconnected with lands: but from that very page of Spelman which Sir Robert Gordon quotes, p. 1. note (*e*), it appears, that before the conqueſt the office had begun to aſſume an hereditary appearance (*e*).

In what manner *Earls* were introduced into Scotland, and what was their original nature, cannot be known. This much however is certain, that after the manner of the Norman Earls, the title was hereditary, and that the eſtate of the earldom went along with the title; and it has been already proved, that both title and earldom went to *heirs-general*, ſo early as in the reign of William the the Lion, that is, *before* 1214.

Sir Robert Gordon argues, " that the Feudal law was the governing law of
" Scotland in the eleventh century. That the Books of Fiefs were written 120
" years after the age of Malcolm III. and that by that law, women were excluded from the ſucceſſion in Fiefs of every kind, whether of land-eſtates or
" offices."

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*c*) Publiſhed by *Selden*, in Titles of Honour, p. 848. Many other examples of the ſame kind might be produced, were it neceſſary.

(*d*) *Chart. Morav.* vol. 1. p. 14.

(*e*) *Spelman.* Gloſſ. voc. *Comes*, p. 141. To the ſame purpoſe *Scalæ Chr.* apud Leland, *Collectanea*, vol. 1. p. 529. " Walteof [ſon of Siward, E. of Northumberland] was
" *very young, and had few frendes*; and the King, [Edward the Confeſſor], *by procure-*
" *ment*, gave Northumberland to Coſtin [l. Toſti], Godwin's ſunne."

For

Reaſon I. Preſump. 1. For proving that the Feudal law was the law of Scotland in the *eleventh* century, reference is made to the opinion of Craig in the *ſeventeenth* century, lib. 1. dieg. 8. § 16.

This paſſage has been often quoted; and as often miſapplied as quoted. Craig's poſition is this: "Quod ſi novus aliquis caſus ſupervenerit, qui *neque jure ſcripto, neque conſuetudine, comprehendatur*, neque ex iis quæ dicimus dirimi poteſt, et caſûs illius deciſio in jure Feudali reperiatur, præferendum jus Feudale et juri Pontificio et juri Romano."

If words can expreſs an unambiguous opinion, the opinion of Craig is this. When both ſtatutes and cuſtom are ſilent as to the deciſion of any particular caſe, and when that caſe is decided by the Feudal law, i. e. the Longobardic Feudal law, the Feudal, not the Canon or Civil law, ought to be followed.

The reaſon which Craig immediately gives, that *repetendæ ſunt origines*, pleads more ſtrongly for the Anglo-Norman law, than for the Longobardic.

However, let the preference which Craig ſhews to the Longobardic law be ſuppoſed juſt.

His rule of preference is this. 1. *Statute* or *poſitive law*. This is clear; for the voice of the legiſlature muſt be heard, and no judge nor private man ought to preſume to oppoſe his ſentiments to the law of the land. 2. *Cuſtom*, *practice*, *precedents*; implying the general opinion and acquieſcence of a nation. This is termed *conſuetudinary law*. 3. In the limitation, ſo to ſpeak, *the Longobardic Feudal law*. (*f*)

By a ſtrange inattention, the *ſecond* ſource of the law of Scotland, as pointed out by Craig, is totally overlooked; and Sir Robert Gordon greedily flies to the *third*. In it indeed he may find the rule of maſculine ſucceſſion eſtabliſhed; mean while cuſtom, practice, precedents, though preferred by Craig to any Longobardic deciſions, are totally overlooked.

During the thirteenth century, we have *ſome* records; during the fourteenth *many*; during the fifteenth and ſixteenth centuries, we have inſtruments innumerable.

Can it be ſuppoſed, that in the courſe of ſo many ages, the rule of ſucceſſion in the direct and in the collateral line remained uncertain? If the rule was determined, then, according to Craig's principles, no recourſe can be had to the Feudal law; our own cuſtoms, practice, precedents, have determined it.

That the rule was fixed in land-eſtates, in juriſdictions and titles of honour, has, in the claimant's humble apprehenſion, been irrefragably proved.

Vainly therefore does Sir Robert Gordon attempt, by quotations from Preſident Monteſquieu, to prove, that the ancient ſucceſſion in Scotland muſt have been limited to *heirs-male*, when cuſtom and precedents ſhow, that *heirs-general* were conſtantly let in.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*f*) It is remarkable, that Chambers of Ormond, a judge of the court of ſeſſion, who wrote about forty years before Craig, appears to have known nothing of the authority of the Longobardic laws. His words are, "Si d'aventure quelque cauſe ſe preſente laquelle "on ne ſçauroit trouver être decidée, ni par les conſtitutions royaulx, ni par les arreſts et "couſtumes du pays, en ſupplement ils ont recours aux raiſons des loix Civiles." *Recherche de ſingularités d' Ecoſſe*, fol. 23. p. 2. Paris, 1579.

Inquiries

Inquiries into the ſtate of a nation, where records are wanting, may amuſe the fancy, but will not inform the judgement. (*g*) Reaſon I. Preſump. 1.

In treating of this *Firſt Preſumption*, Sir Robert Gordon further urges, "That the claimant has brought no inſtance of a female's holding a land-eſtate "before the end of the 12th century, [*i. e.* before the 1200]; and no autho- "rity from a law-book for female deſcent, even in land-eſtates, until the *Re-* "*giam Majeſtatem*, which all good antiquaries agree was borrowed from Glan- "ville, and conſequently could not have been written before the 14th century, "[before the 1300]; that is, three centuries after the origin of the peerage in "queſtion. But ſhe cannot bring rules of deſcent from the 13th and 14th cen- "turies, [from 1200 to 1400], to prove the limitations of a peerage which "was created two or three centuries before theſe rules were thought of."

Here alſo there is much curious matter, which deſerves to be particularly conſidered.

The claimant could not produce *many* examples of female ſucceſſion before the 1200, becauſe there are *very few* examples of any ſucceſſion at all before that æra.

She has, however, produced *one* before 1165, of *Eda*, *filia et hæres Symonis Fraſer*, in the reign of Malcolm IV.; and *many* during the three ſubſequent reigns of William the Lion, Alexander II. and Alexander III. As authentic inſtruments multiply, ſo alſo do her examples of female ſucceſſion.

To produce more ancient examples, was impoſſible: for more ancient inſtruments with reſpect to private inheritances do not exiſt.

If ſhe has eſtabliſhed female ſucceſſion as far back as the records of Scotland reach, ſhe has done all that was poſſible, or could be required of her. If ſhe has proved the law of ſucceſſion to have been the ſame ſix hundred years ago as now, it is incumbent on Sir Robert Gordon to prove, that a different law prevailed before that period of ſix hundred years.

Had the claimant choſen to call in the aid of fable and tradition, ſhe might have procured ample materials from Hector Boece. She might have quoted that law of Malcolm II. which eſtabliſhed the ward of heireſſes (*h*); and that law of Macbeth, which eſtabliſhed the right of primogeniture as to females (*i*); and ſhe

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*g*) It is hard to ſay what inference can be drawn from this circumſtance, that the Books of the Fiefs were compoſed *long after* the days of Malcolm III. unleſs it be, that Gerardus and Obertus, in compiling their work, had the aſſiſtance of the Feudal Conſtitutions, eſtabliſhed in Scotland by Malcolm III.

(*h*) *Boece*, Scot. Hiſt. lib. 11. fol. 245. "Barones vero, ne non ſuppeterent ad regiam "dignitatem facultates, ut cujuſcunque agri domino excedente ex humanis, *hæres*, ſive "mas fuerit, ſive *fœmina*, uſque ad alterum ſupra viceſimum ætatis annum, Regis eſſet "ſub tutela,—uno omnium ſuffragio ſunt aſſenſi."

(*i*) Ibid. fol. 250. "*Fœmina primogenita* ſicut et mares in hæreditatem ſuccedito."

Reaſon I. Preſump. 1. might have proved the authenticity of this conſtitution of Macbeth by the teſtimony of *the beſt of our antiquaries* (*k*).

Reſting *her* cauſe on record, ſhe ſeeks not the aid of fanciful theory, or vain and credulous traditions.

" For proving female ſucceſſion, the claimant has produced no book of the " law of Scotland more ancient than *Regiam Majeſtatem*."—A heavy charge indeed, when it is remembered, that there was none more ancient to produce!

Whether *Regiam Majeſtatem* be the work of David I. or a ſyſtem drawn up by a private perſon, and afterwards approved by the Scottiſh legiſlature, is not material to the queſtion in iſſue.

In ſo far as it contains any paſſages ſimilar to Glanville, let it be ſuppoſed a copy from Glanville; yet ſtill it is an ancient, and a moſt reſpectable authority.

That " it could not have been written before the 14th century be- " cauſe copied from Glanville," is a wonderful poſition. Glanville's work was compoſed while he held the office of Chief-Juſtice of England. Every one knows, that he died at the ſiege of Acon, 1ſt Ric. I. (*l*); and therefore a copy from Glanville might have been made a full century earlier than what Sir Robert Gordon finds it expedient to admit.

But although the claimant ſhould not have been able to produce the authority of a law-book, for female ſucceſſion, earlier than the 1400, ſhe has produced what is more ſatisfactory, the authority of a record, a retour of heirs-parceners in the 13th century, 1271.

Sir Robert Gordon holds a retour of heirs-parceners to be ſomething aukward and unfeudal; his own principles therefore oblige him to admit, that, if the retour of ſuch heirs was known in a remote corner of Scotland ſo early as 1271, the ſucceſſion of females muſt have been fully eſtabliſhed before that period, and conſequently in 1245, when the Earls of Sutherland firſt make their appearance on record, but *twenty-ſix years* before 1271.

That no retours of heirs-general are diſcoverable till 1271, is owing to the penury of records. That there muſt have been many ſuch retours, appears from the ancient examples of female ſucceſſion.

" Eda, filia et hæres Symonis Fraſer," muſt have been retoured as ſuch before 1165, although the evidence has been loſt by the injury of time.

Thus the claimant, inſtead of leaving two or three centuries for theory to ſport itſelf in, has traced back female ſucceſſion beyond the æra of the exiſtence of the family of Sutherland.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*k*) *Craig* de Feudis, lib. 1. dieg. 8. § 2. " Et in Macbetho quædam de ſucceſſione fœmi- " narum caventur."

(*l*) See *Dugdale, Chronica ſeries Cancellariorum*, &c. p. 4. where the authorities are quoted.

SE-

SECOND PRESUMPTION.

Reaſon I. Preſump. 2.

p. 16. "When lands fell into commerce, which they did as early as the *Regiam Majeſtatem*, female ſucceſſion was introduced. Purchaſers inſiſted, that their heirs, both male and female, ſhould take; and women were allowed to do the ſervice of a fief by a ſubſtitute: but peerages were never the ſubject of commerce; nor could a woman ſit in parliament by a ſubſtitute.

"Land is eaſily diviſible among coparceners, but a peerage cannot be divided; it was therefore not unnatural, as the rigour of the Feudal law abated, that women ſhould be let into the deſcent of land; but unnatural, from the nature of peerages, that they ſhould ſucceed to ſuch.

"The law was ſtricter in the deſcent of peerages than of lands. Thus the collateral heir-male of the firſt grantee of the land took the land; but the collateral heir of the patentee could not take the peerage, becauſe not of the body of the patentee. This was ſo decided in the caſe of *Oxenfurd* 1735. Lands conveyed to one and *his aſſigns*, will go to aſſigns; a peerage will not even at this day. This was ſo decided in the caſe of Stair, 1748."

"Women indeed ſometimes held peerages, not by legal deſcent, but by exception from it; 1. When the woman was created a peereſs; 2. When the heir-female was, in the inſtrument of creation, ſpecially named in preference to remoter *heirs-male*, or upon failure of all heirs-male: but where, for want of the original inſtrument, the *exception* appears not, their excluſion by the *general rule* muſt be preſumed."

ANSWER.

Here Sir Robert Gordon is at laſt obliged to admit, that female ſucceſſion was introduced when land became the ſubject of commerce: An ample conceſſion indeed; for it is not known at what period lands became the ſubject of commerce in Scotland; probably as ſoon as a landed man needed money, and a monied man needed land (*a*).

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*a*) That land was the ſubject of commerce in Scotland before 1300, is plain from the following evidences.

Among the inſtruments preſerved in the archives of Alexander III. there is, "Carta de "*terra* empta de Willielmo de Valloniis, et obligatio ejuſdem, juxta S. rivelyn." *Rymer*, t. 2. p. 219.

By the Canons of the Church of Scotland 1242, c. 23. it is provided, "Ut clerici be"neficiati de cætero *domus aut poſſeſſiones* laicas, ad opus concubinarum, et filiorum ſuorum, "*emere* non præſumant."

The

Reaſon 1. Preſump. 2. The diſtinction between ſucceſſion to lands purchaſed, and to lands acquired, is ideal. The limitation in both caſes muſt be held as conceived *hæredibus ſuis*. A limitation in a diſpoſition of lands purchaſed, to *heirs, female as well as male*, would be a novelty. *Hæredes ſui* then muſt have been interpreted in different ſenſes, juſt as the lands happened to be acquired by purchaſe or by grant. A ſearch for centuries paſt would have been often neceſſary for aſcertaining the original mode of acquiſition, and for determining the import of that clauſe *hæredes ſui*, which occurred in every title-deed of the nation All this muſt have happened; and yet no veſtige whatever of ſuch a diſtinction is any where to be found. Towards the cloſe of the eighteenth century the counſel for Sir Robert Gordon have diſcovered it, not by record, but from theory.

That there was no ſuch diſtinction, is evident from the ancient charter of Panmure (*b*). It was granted to Valloines, *et hæredibus ſuis*. No one can imagine, that it was granted for a price paid to the Sovereign; and yet the lands were enjoyed by the daughter of Valloines.

Sir Robert Gordon adds, "That peerages were never the ſubject of commerce; "and although a woman might do the ſervice of a fief by a ſubſtitute, ſhe could "not ſit in parliament by a ſubſtitute."

This obſervation is rather ſingular, as in the very ſame paragraph Sir Robert admits, "That a female might hold a peerage, either by creation, or by a limi- "tation in the patent to *heirs-general*."

The claimant would aſk, Did ſuch a peereſs ſit in parliament by a ſubſtitute? Whether ſhe did or did not, the argument from the neceſſity of appearing perſonally in parliament flies off.

Beſides, it is too peremptory to ſay, "That peerages were never the ſubject "of commerce." Perſonal peerages cannot; but when peerages were territorial, ſuch commerce might take place. Rarely indeed; becauſe in a country where there is much pride of family, there will be few ſellers; and where there is little money, there will be few purchaſers.

It is true, that in one ſenſe territorial peerages could not be the ſubject of commerce, properly ſo called: for that, if the Sovereign made a grant of a *comitatus*, with juriſdiction, to a man, *et hæredibus ſuis*, ſuch grant could not oblige the Sovereign to let in aſſigns and purchaſers. And thus the territorial dignity could not be transferred, without the conſent or ratification of the Sovereign. This obſervation will diſengage the caſe from much perplexity, which Sir Robert Gordon, by not attending to the nature of the Scottiſh conſtitution, has created.

If the ſervice of a fief was twofold, implying attendance in war, and attendance in council, a woman might perform the one by a ſubſtitute as well as the other.

Our means of knowledge in the ancient Scottiſh hiſtory are ſo ſcanty, that we cannot trace every circumſtance of the law of parliament.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*b*) Grant by William the Lion before 1214. *Crawfurd*, Officers of State, Appendix, N° 25. formerly quoted.

The

The record 1284 ſhews, that more perſons than one appeared in the parliament of Alexander III. in right of their wives (*c*). Reaſon I. Preſump. 2.

It has been ſhewn, that a very great number of *baronies* did deſcend to *heirs-general.* If they performed their ſervice in council, as well as in war, by a ſubſtitute, or rather by a huſband in their room, they muſt have been freed from part of the burden of their tenures.

At this day the huſbands of heireſſes vote at elections in virtue of their wives freehold; and there is nothing to prevent the whole freeholders of Scotland being repreſented in parliament by men having no right of property or ſuperiority in their own perſons, independent of their relation as the huſbands of female freeholders.

From the ancient practice in England, we may conclude by analogy as to the ancient practice in Scotland.

In 1282, Edward I. ſummoned many ladies to accompany him in his wars againſt the Welſh (*d*).

In 1291, he ſummoned the ladies of Cumberland and Weſtmoreland to attend him at Norham, "with horſe and arms, and all ſervice due (*e*):" A ſummons which, by reaſon of its conſequences, Scotland will never forget.

In 1294, he ſummoned other ladies to the wars in Gaſcogny (*f*).

In 1361, Edward III. ſummoned a council of thoſe who held lands in Ireland. In this ſummons the names of many ladies appear: they are required to ſend proxies (*g*).

It was uſual to ſummon huſbands to parliament in right of their wives (*h*).

That a peerage cannot be divided while lands may, is no reaſon for females being excluded from a peerage while they ſucceed to lands. The ſame reaſon would equally operate againſt female ſucceſſion in other particulars. The capital meſſuage and juriſdictions are no leſs indiviſible than a peerage; yet they have gone conſtantly to the eldeſt *heir-general* by the ancient cuſtoms of Scotland. So alſo have ancient peerages (*i*).

Sir

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*c*) *Rymer*, t. 2. p. 266. John de Strathbolgie, Earl of Athole, and Walter Stewart, Earl of Menteth.

(*d*) *Rymer*, t. 2. p. 200. Iſabella de Fortibus Comitiſſa Albemarl. et Devon. Elena le Zuche. Amabilia de Segrave, Domina de Wyth, Agn. de Veſcey.

(*e*) *Rymer*, t. 2. p. 525. Domina de Ros, Domina de Kendall, Margareta de Ros, Iſabella de Clifford, Idonia de Leyburn, Matilda de Multon Domina de Gilleſland.

(*f*) *Rymer*, t. 2. p. 642. Mileſerta de Monte Alto, Margareta de Nevil, Iſabella de Ros.

(*g*) *Rymer*, t. 2. p. 318.—20. "Aliquem vel aliquos mittatis."

(*h*) Many ſuch examples are produced by *Dugdale*, Summons of Nobility, p. 576.

(*i*) There is one example in the family of Dunbar, Earl of Moray, where both the co-parceners aſſumed the title; and yet the youngeſt, as it would ſeem, maintained the poſſeſſion. James Dunbar, Earl of Moray, died in the reign of James II. leaving two daughters; *Janet*, the wife of James Lord Crichton; and *Mary*, the wife of Archibald

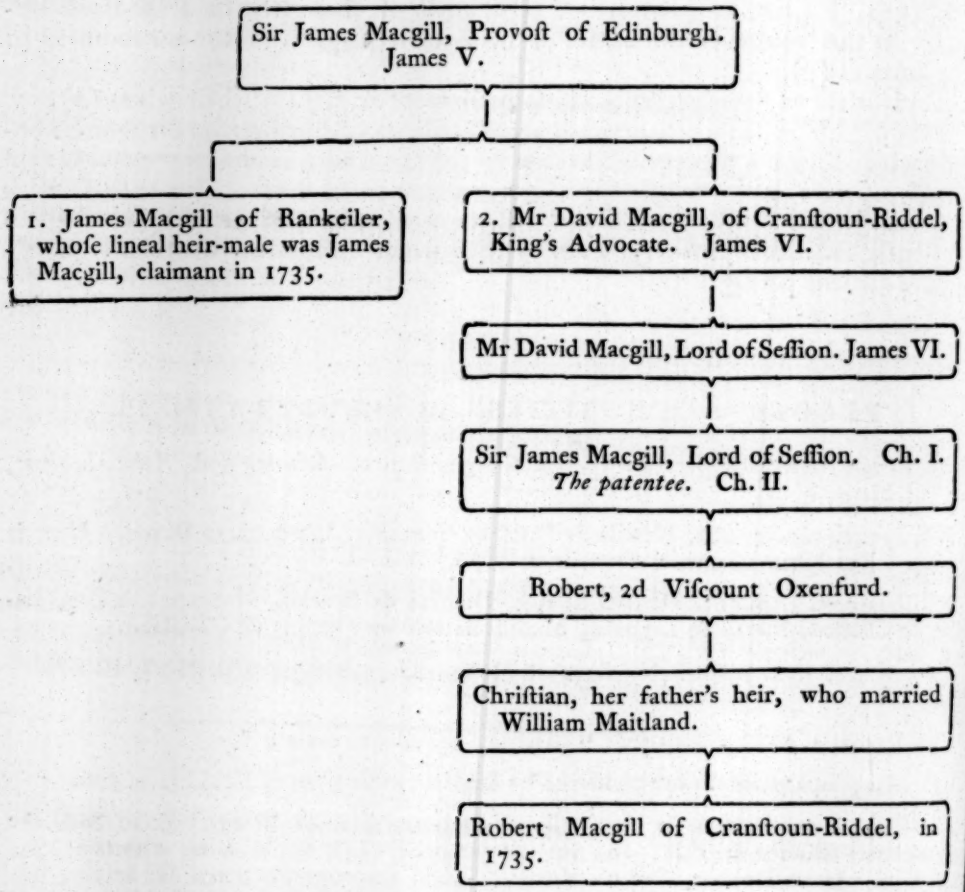
Reaſon I. Preſump. 2. Sir Robert Gordon ſaw the neceſſity of eſtabliſhing different rules in the ſucceſſion to peerages and to lands. He therefore avers, "That the collateral heir "of the patentee would not take the peerage deviſed *hæredibus ſuis*, although "the collateral heir of the firſt grantee would take the lands (*k*)." This, he ſays, was determined by the Houſe of Peers in the caſe of Oxenfurd.

There is an obvious difference between the one caſe and the other; founded on this, that the patentee is the ſtream by which the titles flow from the ſovereign, the fountain of perſonal honour. When the ſovereign diſtinguiſhes a family, for the merits of a particular perſon, he may be preſumed to have extended the *effects* of this diſtinction no farther than its *cauſe*.

Had ſuch been the circumſtances of the caſe of Oxenfurd, decided by the Houſe of Peers, ſuch might be preſumed to have been the principle of the deciſion. But indeed the caſe of Oxenfurd has no relation to what Sir Robert Gordon is pleaſed, upon its authority, to lay down as certain law.

In 1651, Charles II. granted the dignity of Viſcount Oxenfurd and Lord Macgill of Cranſtoun, to Sir James Macgill, with a limitation, "*ad hæredes maſculos tallię et proviſionis quoſcunque.*"

In 1735, James Macgill of Rankeiler claimed the peerage. The nature of his claim will appear from a pedigree of the family.



[*To make room for the above pedigree of the family of Oxenfurd, the notes are carried to the next page.*]

From

From this pedigree it appears, that James Macgill the claimant was the *heir-male* of the patentee, being deſcended from the elder brother of the patentee's grandfather. Reaſon I. Preſump. 2.

He was not however the *heir of proviſion* of the patentee. That character belonged to Robert Macgill of Cranſtoun-Riddel, the ſon of Chriſtian, who was the grand-daughter of the patentee.

Robert Macgill, the heir of proviſion, did not himſelf claim, but he oppoſed the claim of James.

On the 25th April 1735, "The Earl of Crawfurd reported from the Lords "Committees for privileges, that they are of opinion, that the petitioner has "not made out any right to the honours and titles of Viſcount of Oxenfurd and "Lord Macgill of Couſland. Which report was agreed to by the Houſe."

This was a deciſion unexceptionably and demonſtratively juſt. The claimant had in his perſon *one half* of the deſcription in the limitation; but he had not *the other half*. In ſuch circumſtances, his claim for the honours of Oxenfurd was put in, heard, and diſmiſſed.

Nevertheleſs Sir Robert Gordon quotes this caſe as a precedent in point for proving, "that the collateral heir of the patentee could not take the peerage, "becauſe not of the body of the patentee."

This was a queſtion, which, from the nature of James Macgill's claim, the Houſe of Peers had no occaſion to determine in the caſe of Oxenfurd.

For the reaſon formerly given, this queſtion touches not the preſent one, even in the way of collateral argument.

It is believed, however, that if the queſtion were ever brought before the Houſe of Peers, their Lordſhips, before pronouncing judgement, would permit the nobility of Scotland to be heard.

More titles of honour than one are at this moment enjoyed, without challenge, in direct oppoſition to that principle which Sir Robert Gordon here lays down.

The caſe of Stair was determined upon a principle different from that which Sir Robert Gordon mentions: ſee the *Printed Caſes*. Had it been determined upon the general principle, That a Scottiſh peerage could at no time have been tranſmitted to *aſſigns* by virtue of a patent ſo conceived, the determination would have proved fatal to the peerage of Roxburgh, and ſeveral others.

In the concluſion of his *ſecond* preſumption, Sir Robert argues, "that

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

Douglas, brother of James Earl of Douglas. That Janet aſſumed the title of *Counteſs*, appears from *Ch. Dunferm.* vol. 2. where there occurs a confirmation of a charter granted by "Joneta de Dunbar, *Comitiſſa Moraviæ*, ac Domina de Frendraught, et de Crech-"ton," in favour of Walter Ogilvy of Beaufort, of an annual rent of 33 s. and 4 d. out of her lands of Fordochy, and the ſuperiority of the lands of Fordochy and Kethic, dated 8th November 1454. It is no leſs certain, that the other daughter, Mary, aſſumed the title of *Counteſs*. Whether this was owing to ſome compromiſe ratified by the King, or to the exorbitant power of the Douglas family at that period, cannot with certainty be diſcovered. One example of this kind, while it confirms the rule as to female ſucceſſion, will not invalidate the right of primogeniture in co-parceners by the cuſtom of Scotland.

(*k*) It is plain that he means to ſpeak of a patent deviſed *hæredibus ſuis*; although, by the inaccuracy of his expreſſion, he has left this to be collected from the general ſtrain of the argument.

She

Reaſon I. Preſump. 2. " women held peerages only by exception from the general rule; and, therefore, " that their excluſion by the *general rule* is rather to be preſumed, than their ad- " mittance by the *exception*."

The claimant has already anſwered this argument at great length; and, as ſhe humbly truſts, to the conviction of every intelligent reader.

She has ſhewn, that the *general rule* is ideal; and therefore ſhe has no occaſion to reſort to the *imagined exception* in ſupport of her claim.

THIRD PRESUMPTION.

p. 16. 17. " Even in lands, as well as peerages, by a limitation to *hæredibus* " *ſuis*, or *hæredibus inter ipſos*, were for ſome centuries underſtood in " Scotland heirs-male only, p. 2. of this Caſe, Notes, letter (*l*), where " the authorities are quoted. Now, if even the expreſs words, *hære-* " *des*, or *hæredes inter ipſos*, would not have let in females at the time " this ancient peerage was created, how can the inſtrument of creation, " the terms of which are not known at all, becauſe loſt, or *pretended* ſo, " be preſumed to admit them?"

ANSWER.

The inference is fair, and, bating that injurious and ill-choſen word *pretended*, is fairly urged. But the defect of the argument lies in the propoſition, " That, by the limitation *hæredibus ſuis*, or *hæredibus inter ipſos*, heirs-male " alone were underſtood."

The only apology which the claimant can make for the length of her argument in ſupport of the contrary ſuppoſition, is not to reſume it again.

FOURTH PRESUMPTION.

p. 17. " It is a rule, *Quod plerumque fit, præſumitur; quod raro fit, non* " *præſumitur*. Since the creation of Scots peerages, whoſe limitations " can be diſcovered, near nine tenths have been limited to heirs-male, " or to heirs of line only upon the failure of heirs-male. Lady Eliſa- " beth can claim no favour from the loſs, or *pretended* loſs, of the inſtru- " ment of creation, but muſt ſubmit to the preſumption ariſing from the " moſt cuſtomary limitations of peerages, whereby ſhe is excluded, at " leaſt during the exiſtence of any heir-male."

ANSWER.

The rule here laid down is a good one, when rightly underſtood. In a queſtion concerning the ſucceſſion to a peerage which exiſted in the 13th century, a preſumption will ariſe from the mode of ſucceſſion to peerages in the 13th century.

But to preſume for a mode of ſucceſſion in the 13th century, from the form of patents in the 17th and 18th centuries, is to deviate from the rules of moral evidence; it is a preſumption illogical and inconcluſive.

By

By the ſame mode of reaſoning, we muſt preſume, that ancient titles of honour in England ſtood limited to heirs-male of the body of the patentee, becauſe modern patents generally ſtand ſo limited. Reaſon 1. Preſump. 4.

Whether *nine tenths* of the *creations* of Scottiſh peerages are limited to heirs-male, the claimant knows not. The only authority for the aſſertion is *Douglas*, whoſe inaccuracy Sir Robert Gordon acknowledges, even while he quotes him. For the reaſons already given, the fact is perfectly immaterial to the queſtion in iſſue (*l*).

FIFTH PRESUMPTION.

p. 17. " In a doubt concerning the deſcent of a peerage whoſe limitations " do not appear, *the prevailing courſe in ſimilar caſes* muſt afford a " found ground of preſumption. It was *the continual cuſtom* of Scot- " land, *without exception*, that, in ſuch peerages, the remoter heir- " male ſucceeded, in prejudice of the heir of line. Sir Robert Gordon " has produced a long liſt of inſtances of theſe things ſubjoined in the " note (*i*), with the proper evidences to ſupport them."

ANSWER.

Sir Robert Gordon was aware, that an inſtance or two running contrary to *a prevailing courſe*, would have been of little importance; *that* might have been owing to the error of conveyancers, or to other cauſes unknown: and he therefore judiciouſly appeals *to the continual practice of* Scotland, *without exception.*

For proving this propoſition, he has ſubjoined a liſt, containing *twenty-eight* examples, between 1379 and 1767, comprehending a period of four centuries.

The liſt in outward ſhew is goodly; but upon a narrow inſpection it will be found, that in ſome of the inſtances, neither the heir-female nor the remoter heir-male ſucceeded; that in others the heir-female, and her iſſue, did ſucceed *both* to the eſtate and dignity, and excluded the heir-male; and that in all the other inſtances, the dignified fief ſtood limited to *heirs-male*; and accordingly that the remoter heir-male did ſucceed to the dignity, and alſo to the eſtate, if exiſting.

The claimant, for the ſake of perſpicuity, has ranged the twenty-eight inſtances in chronological order.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*l*) The appeal made by Sir Robert Gordon to the *perſonal knowledge* of the ſixteen peers of Scotland, is ſomewhat ſingular. He cannot require any peer to ſet forth the limitations of his own peerage: neither is any peer preſumed to know the limitations of another's peerage. More might be ſaid upon this ſubject, were not the claimant afraid of being inſenſibly led into an impropriety.

Reaſon I. Preſump. 5. She propoſes to examine the lordſhips firſt, and then the earldoms.

Lorne. 1466.

1. *LORNE.*

p. 17. "The peerage of Lorne, the limitations of which are unknown, was "enjoyed in 1452 by John Lord Lorne. He died without iſſue-male; "and though he left daughters, who got *a part of the eſtate*, yet his "brother Walter ſucceeded as heir-male to the peerage of Lorne." Evidence, Royal Charter, "Johanni Domino Lorne, 20th June 1452, "b. 4. N° 176. &c."

ANSWER.

It is true, that John Lord Lorne died without iſſue-male; that he left iſſue-female; and that his brother Walter is ſtyled *Dom. Lorne.*

But this, inſtead of invalidating the claimant's plea, ſtrengthens it; and is one example, out of many, that the titles of honour went with the dignified fief.

That *very charter* which Sir Robert Gordon quotes, is of the "dominium "de Lorne, baronia de Innermeath," &c. limited, "Johanni Domino de "Lorne, et *hæredibus maſculis* de corpore ſuo legitimè procreatis ſeu procre-"andis; *quibus fortè deficientibus*, Waltero Stewart, fratri germano dicti Johan-"nis, et *hæredibus maſculis* de corpore ſuo," &c.

The *dominium de Lorne* deſcended to Walter Stewart, failing the iſſue-male of John, for ſuch was the expreſs limitation of the grant.

When Sir Robert Gordon ſaid, that "the daughters of John *got part of the* "*eſtate*," he ought to have explained himſelf, by ſaying, his *ſeparate eſtate*; for they could get no part of the *dominium de Lorne.*

Not long after, Walter Lord Lorne reſigned his lordſhip of Lorne to Colin Earl of Argyle, huſband of Iſabel, the eldeſt daughter of John Lord Lorne.

The Earl of Argyle, in conſequence of this, obtained a royal charter, 17*th April* 1470. In the charter Walter is ſtyled from his other barony, *Lord Innermeath.*

In 1472, Colin Earl of Argyle is ſtyled, *Dominus Lorne*, 26th February 1472.

Ever ſince that period both the eſtate and the title of Lorne have been enjoyed by the family of Argyle.

Haliburton. 1519.

2. *HALIBURTON.*

p. 20. "This is an ancient peerage, of which the limitations are not known. "Some time prior to the 1519, the peerage was enjoyed by Patrick "Lord Haliburton. He died without iſſue-male; but leaving ſeveral "daughters, the eldeſt was married to William Maſter of Ruthven, el-"deſt ſon of Lord Ruthven. But the peerage *extinguiſhed* by the death "of her father."

A N-

ANSWER.

Sir Robert Gordon's propoſition led him to prove, that the *remoter heir-male* ſucceeded in preference to the *heir-general*. Here, however, he avers, not that the *remoter heir-male* did ſucceed: he only attempts to prove, that the *heir-general* did not. Reaſon I. Preſump. 5.

Even in this he greatly errs. It is eaſy both to point out his miſtake, and its cauſe.

The full title of the once potent family of Haliburton was *Haliburton and Dirleton*; or perhaps, more properly, *Haliburton of Dirleton*; like *Fraſer of Lovat*, *Forbes of Pitſligo*, *&c.*

In the rolls of parliament, the Lords Barons are often named by the double title of their ſurname and their barony. Thus there occur in the rolls, *Lord Herries of Terregles*, *Crichton of Sanquhar*, *Lindſay of Byres*, *Hay of Yeſter*, HALIBURTON OF DIRLETON, all pointing out the connection between the *lordſhip* and the *Lord*.

Sometimes the title is marked from the ſurname alone; at other times from the barony alone.

Thus, in the roll 1469, *Haliburton* is the title; in the roll 1487, *Dirleton*.

Sir Robert Gordon, not obſerving any mention in the records, after 1519, of Lord Haliburton, has preſumed, that the title was annihilated (*a*); yet it is certain, that both the eſtate and the title went to the heirs-general of Patrick Lord Haliburton of Dirleton.

In a ſubſequent note, p. 29. Sir Robert Gordon has ſtated evidence for proving, that the eſtate ſtood limited *hæredibus ſuis*. Here he ſtates evidence for proving, that in 1529 the heir-general took the eſtate.

By this charter, confirmed in 1529, the lands are taken to be held "*de Nobili* "*Domina* Joneta Halyburton (*b*), filia ſeniore ac una hæredum quond. *Nobilis* "*Domini Patricii Domini de Dirleton, Halyburton, et Lambden*, ſuis hæredibus "et aſſignatis."

To this charter ſhe appoints to be appended, "SIGILLUM MEUM PRO-"PRIUM, *una cum ſigillo dict. ſponſi mei in ſignum ſui conſenſûs.*"

The title of *Lord Dirleton* remained in Patrick, the ſon (*c*), and in William, the grandſon, of Lady Janet Haliburton.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*a*) The claimant ſays *annihilated*, inſtead of *became extinct*; for there is no doubt that the male deſcendents of Haliburton of Pitcur, a ſecond ſon of the firſt Lord Haliburton, did then exiſt.

(*b*) Sir Robert Gordon, by quoting a different clauſe in the charter, has omitted *Nobilis Domina*. If *Nobilis Dominus*, which juſt follows, means, in the language of that age, *ane Nobil Lord*, ſurely *Nobilis Domina* muſt mean *ane Nobil Lady*.

(*c*) A celebrated perſonage in the Scottiſh hiſtory: He it was who ſlew Rizzio in 1566.

Her

Reaſon I. Preſump. 5. Her grandſon, bearing the title of *Lord Ruthven and Dirleton*, was created Earl of Gowrie (*d*).

Her great grandſon, John Earl of Gowrie, forfeited in 1600; and thus the title of *Lord Haliburton*, or *Dirleton*, returned to the crown.

This inſtance, therefore, inſtead of ſupporting Sir Robert Gordon's hypotheſis, utterly ſubverts it.

Home. 1531.

3. *HOME.*

p. 18. "This is an ancient peerage, of which the limitations are not known. "Alexander Lord Home left a brother George, and a daughter Janet. "Janet was excluded from the peerage by her uncle George."

ANSWER.

This inſtance alſo, when explained, is a further confirmation of the claimant's plea.

In 1516, Alexander Lord Home obtained a royal charter, limiting the *dominium et baronia* of Home to Alexander, and his heirs-male, "ſecundum for- "mam cartæ talliæ, per quondam nobiliſſimos prædeceſſores noſtros, bonæ "memoriæ, predeceſſoribus ſuis, et *eorum hæredibus maſculis*, deſuper "factæ."

Immediately after obtaining this charter, Alexander Lord Home forfeited, and ſuffered death for high treaſon.

Had it not been for this event, his brother George muſt have ſucceeded to him. Sir Robert Gordon has elſewhere ſhewn (*e*), that the ſentence of forfeiture was afterwards reſcinded. In conſequence of this, the eſtate and honours went to the heir-male, juſt as they would have done had there been no forfeiture.

Gray. 1541.

4. *GRAY.*

p. 19. "Patrick Lord Gray died in 1541, leaving an heir-male, his nephew, "Patrick Gray, and many daughters. This Patrick ſucceeded in the "peerage, to their prejudice."

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*d*) Royal Charter, and inſtrument of creation, 20th October 1581, "Willielmo Do- "mino Ruthven et *Dirleton*;" and ratification in parliament, of the heritable infeoffment and charter granted to "William Earl of Gowrie, Lord Ruthven and *Dirleton*;" with the confirmation thereof in parliament, Nov. 1581, containing a new erection in favour of "James Earl of Gowrie, Lord Ruthven and *Dirleton*," 5th June 1592. This James died childleſs, and was ſucceeded by his brother John, ſlain at Perth, 5th Auguſt 1600.

(*e*) *Supplemental Caſe* for Sir Robert Gordon, p. 9. note (*x*).

AN-

ANSWER.

The anſwer to this inſtance is to be found in a royal charter 1542, reciting and confirming another royal charter, of the whole family-eſtate, baronies, offices, &c. limited, "quond. Patricio Domino de Gray, et *hæredibus ſuis maſculis* "de corpore ſuo legitimè procreatis ſeu procreandis; quibus deficien. *Gilberto* "*Gray de Buttergaſk, ejus fratri, et hæredibus ſuis maſculis* de corpore ſuo "legitimè procreat. ſeu procreand.; quibus deficientibus, legitimis et propin- "quioribus *hæredibus maſculis* dict. quondam Patricii, arma et cognomen de "Gray gerentibus, quibuſcunque."

Reaſon I. Preſump. 5.

This limitation of the land-eſtate, baronies, and offices, to a ſeries of heirs-male, accounts for the tranſmiſſion of the honours to the heir-male.

5. *HERRIES.*

Herries. 1550.

p. 20. "This peerage was enjoyed before 1550 by William Lord Herries. "He died without heirs-male, but leaving three daughters; the eldeſt "of whom was married to Sir John Maxwell: upon the death of Lord "William, the peerage became extinct. *Evidence*, Royal Charter, 1ſt "February 1550, b. 30. N° 497. "Dilectis noſtris Johanni Magiſtro de "Maxwell, et *Agnetæ Herres, ſeniori filiarum, et uni trium hæredum,* "*quond. Willielmi Domini Herres*, ſponſæ dicti Johannis." Upon the "extinction of this peerage, the King renewed it in the perſon of this "Sir John Maxwell. *Evidence*, Records of parliament, 16th April "1567."

ANSWER.

Here again Sir Robert Gordon, inſtead of proving, "That the remoter heir-"male ſucceeded to the prejudice of the heirs-general," expreſsly aſſerts, that the peerage became extinct. This anſwer might ſuffice for ſhewing, that the inſtance of Herries does not aid Sir Robert's hypotheſis.

But the claimant will do more: ſhe will ſhew, that in 1550 there exiſted an heir-male; that he did not take the title; that the heir-general took the eſtate, which ſtood limited *hæredibus ſuis*; and that ſhe, and her huſband in her right, took the title alſo.

William Lord Herries died before 1550, leaving iſſue three daughters: the eldeſt, Agnes, married John *Maſter of Maxwell* (*f*).

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*f*) In the language of thoſe times *Maſter* implied the heir-preſumptive of a peer.—Robert Lord Maxwell, the elder brother of this gentleman, had no children at that time.

Reaſon I. Preſump. 5. That William Lord Herries left an heir-male, is proved by a royal charter, 7th Auguſt 1562, confirming a charter 22d March 1561, granted by "Archibaldus "Herreis de Madinpany, ac *hæres maſculus quond. Wilhelmi Domini Herreis de "Terreglis*, Honorabili Viro Johanni Maxwell de Terreglis, Militi, et *Dominæ* "Agnetæ Herreis ejus conjugi (*g*)."

Here the *heir-male* is ſo far from aſſuming the title, that he acknowledges the right of the *heir-general*.

In 1566, the whole barony of Terregles was, by a royal charter, of new erected into a barony and lordſhip, and granted to the foreſaid John Maxwell, "et Do- "minæ Agnetæ Herreis, ſuæ ſponſæ."

In 1567, this John ſat in parliament under the title of *Lord Herreis*.

Hence Sir Robert Gordon infers, that the King *revived* the peerage in the perſon of John Maxwell. Of this revival there is no veſtige. And indeed the thing is impoſſible: for if the peerage did not go to the *heir-general* of William Lord Herreis, it muſt have gone to the *heir-male*; it could not be loſt between them: nor could there be a *revival* of a peerage *not extinct*.

From all which it may be concluded, that John Maxwell appeared in parliament in right of his wife.

Fleming. 1557

6. *FLEMING.*

p. 17. "James, the ſon of Malcolm Lord Fleming, who lived in 1557, left "a younger brother John, and a daughter Jean; but John ſucceeded in "the peerage, to her excluſion."

ANSWER.

Here the fact ſtood thus: James Lord Fleming had made over the whole family-eſtate to his brother John, and his heirs and aſſigns, under a condition of return to the heirs-male of his own body, and of payment of certain portions to his daughters. In 1557, John obtained a royal charter, confirming this grant. By virtue thereof he took both eſtate and dignity, to the excluſion of his niece Jean, the heir-general.

Hay of Yeſter, 1591.

7. *HAY of YESTER.*

p. 17. "Yeſter is an old peerage, the limitations of which are unknown. "William Lord Hay of Yeſter died ſometime before 1591, leaving ſe- "veral daughters, but no iſſue-male: yet was ſucceeded in the peerage

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*g*) This Archibald Herries of Madinpany [pronounced *Mabie*] was probably the ſon of Robert, younger brother of William Lord Herreis.

"of

" of Yeſter by James Hay his brother. Jane Hay, one of his daughters, Reaſon I.
" married Alexander Horſburgh. *Evidence:* 1. Royal charter, " *Wil-* Preſump. 5.
" *lielmo Domino Hay de Yeſter*, penult. Feb. 1590, b. 38. N° 281. In
" this charter James the brother is mentioned, and the daughters of
" Lord William. 2. Royal charter, confirming a charter by the provoſt
" of the collegiate church of Bothans, *Jacobo Domino Hay de Yeſter*,
" 6th September 1592, b. 37. N° 494. 3. Retour, 17th May 1620,
" b. 71. fol. 292. in which the jury return, " *Quod quondam Williel-*
" *mus Dominus Hay de Yeſter, proavus Alexandri Horſburche, filii*
" *legitimi natu maximi Alexandri Horſburche de Eodem, inter ipſum et*
" *quondam Jeannam ſponſam, unam filiarum quondam Willielmi Do-*
" *mini Hay de Yeſter, legitimè procreat.*" &c.

ANSWER.

Here Sir Robert Gordon has confounded two different perſons. The ſervice of Alexander Horſburgh is as one of the ſix heirs-parceners of William Lord Hay, who died in Auguſt 1586; and could not be the ſame perſon who obtained the charter in February 1590-1.

This may ſerve to ſhew, that Sir Robert Gordon did not underſtand the ſtate of the family of Lord Hay of Yeſter.

Had a proper ſearch been made into the records, this inſtance would never have been produced by Sir Robert Gordon.

The fact is, that in 1590, William Lord Hay of Yeſter, upon his own reſignation, obtained a royal charter of the barony of Yeſter, and various other lands, all erected into one lordſhip and free barony, to be called, " *Dominium et baro-*
" *nia de Yeſter.*"

The charter 1590 is limited thus: " Willielmo Domino Hay de Yeſter, et
" *hæredibus ſuis maſculis* de corpore ſuo legitimè procreatis ſeu procreandis;
" quibus deficientibus, Jacobo Hay, ejus fratri germano, *ſuiſque hæredibus maſ-*
" *culis* de corpore," &c.

The charter contains a clauſe which merits particular attention: It provides, " Propter exonerationem noſtræ conſcientiæ, et conſcientiæ dicti Willielmi Do-
" mini Hay de Yeſter, *in excludendis filiabus et hæredibus fœmineis a ſuo na-*
" *talicio*;" that if Lord Hay died without iſſue-male, his brother ſhould pay certain ſums of money to his iſſue-female.

It happened, that before taking infeoffment on this charter, William Lord Hay of Yeſter died, leaving no iſſue-male.

Upon a recital of this event, the King granted a new charter to James Hay, and his heirs-male, [29th May 1591], of the " *dominium et baronia* de Yeſter;" containing a new erection, and a grant of a vote in parliament. &c. " et omnes
" alios *honores*, *dignitates*, et præeminentias, quæ per dict. quondam Williel-
" mum Dominum Hay de Yeſter, alioſve ſuos prædeceſſores, aliquo tempore
" retroacto poſſeſſæ vel gaviſæ fuerunt; ſimili modo, et adeo liberè, ac ſi
" dict. quond. Willielmus Dominus Hay de Yeſter in hæreditario feodo præfat.
" terrarum, baroniarum, et dominiorum, obiiſſet; et ac ſi dict. Jacobus, ejus

" frater

Reaſon I. Preſump. 5. " frater germanus, ſibi in eiſdem, tanquam hæredi maſculo et talliæ, per bre- " via capellæ noſtræ, intraſſet (*h*)."

It was about this period that the practice of making a ſpecial grant of titles of honour began to prevail. In this particular caſe, ſuch grant ſeems to have been thought neceſſary, for excluding all claim of the daughters of William Lord Hay of Yeſter.

The retour 1620 is not to this Lord Hay; for, by reaſon of his ſettlements, the deſcendents of his heirs-general could take nothing: it is to his father, who died in 1586; and it would have tranſmitted any ſubject not contained in the charter 1590.

Had Sir Robert Gordon conſulted the records, he never would have averred, that the limitations of the peerage of Hay of Yeſter were unknown; nor would he have argued from the preference of the *heir-male* in that caſe to the *heir-general*.

Lindeſay of Byres. 1609.

8. *LINDESAY.*

p. 18. " This peerage was enjoyed before 1609 by John Lord Lindeſay: He " left a brother Robert, and a daughter Ann: Robert took the peerage " in preference to her."

ANSWER.

The " *dominium et baronia* de Byres" ſtood limited to heirs-male, near a century before. *Royal charter* to John Lindeſay, eldeſt ſon and apparent heir to Patrick Lord Lindeſay of Byres, and his heirs-male, 30th May 1524.

Hence the retour of Robert Lindeſay in 1609 is, " tanquam legitimus et pro- " pinquior *hæres maſculus* quondam Johannis Domini Lindeſay de Byres, fra- " tris ſui, in terris et *dominio et baronia de Byres*."

This accounts for the preference of the heir-male to the heir-general.

Gray. 1628.

9. *GRAY.*

p. 19. " Andrew Lord Gray, who lived in the beginning of the laſt century, " left a daughter, and ſole heir, married to William Gray younger of " Pittendrum: but ſhe being a female, could not take the peerage; and " therefore Charles I. revived it by a patent to this William Gray, and

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*h*) In this charter, the veſtiges of the ancient territorial ideas appear. In our days it is of no moment whether the laſt peer be infeoffed or not; the title of honour ſtill deſcends. In 1591, a different notion appears to have prevailed. If we adjuſt every ancient fact to the ſtandard of our own times, we muſt often ſtretch, and often lop.

" the

" the heirs-male of the marriage betwixt him and Anne Gray, the daugh- Reaſon I.
" ter of Lord Andrew." Preſump. 5.

ANSWER.

For proof of this propoſition, a charter of Charles I. 8th January 1628, is quoted, uncouth in itſelf from its verboſity, and rendered more uncouth by ſtrange typographical errors.

It is demonſtratively plain, that *this* is no inſtance of "a remoter heir-male " ſucceeding in the peerage to the excluſion of the heir-general."

The charter recites, That Andrew Lord Gray had given his only daughter in marriage "*Gulielmo Gray juniori*, legitimo et primo filio Gulielmi Gray de " Pittendrum;" and that he had ſettled his eſtate upon his daughter, her huſband, and their heirs-male.

It adds, that the King, upon the ſupplication of Lord Gray, granted to the foreſaid William Gray younger, the title of *Maſter of Gray*, during the life of Lord Gray, and after his death the title of *Lord Gray*; "tam liberè omni ratione " et reſpectu, ac ſi præfatus Gulielmus Gray junior, filius legitimus de corpore " dicti Andreæ Domini Gray, procreatus eſſet, eique tanquam hæres maſculus " ſucceſſurus eſſet."

In this inſtrument William Gray of Pittendrum *elder* is mentioned as alive; ſo that his ſon could not be even heir-preſumptive to the honours of Gray.

That Gray of Pittendrum was the neareſt heir-male, is not aſſerted in the inſtrument.

Upon the ſuppoſition of his being heir-male, there was no injury done to his family; upon the contrary ſuppoſition, the intereſt of the heir-male of the family of Gray has been overlooked.

Indeed the only way of juſtifying this charter, is by ſuppoſing it equivalent to a new grant of peerage upon a reſignation by the peer in poſſeſſion.

In no way can it aid Sir Robert Gordon's argument; for if Gray younger of Pittendrum be held heir-male, the charter gave him nothing which he was not intitled to take by the ancient inveſtitures; and if he be not ſo held, this can be no inſtance of the preference of the heir-male.

10. *BOYD.* Boyd. 1640.

p. 17. "The limitations of this peerage are unknown. Robert Lord Boyd " died in September 1640 without iſſue. He left ſeveral ſiſters; and his " peerage went to his uncle James Lord Boyd, to the excluſion of his " ſiſters (*i*)."

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*i*) The claimant has, to the beſt of her abilities, corrected the typographical errors in Sir Robert Gordon's Supplemental Caſe. Thus, in the preſent inſtance, 1640 is a correction for 1540, *ſiſters* for *daughters*, and *without iſſue*, for *he left no iſſue-male*.

ANSWER.

Reaſon I. Preſump. 5. It was ſcarcely pardonable to quote this inſtance, when the records, which Sir Robert Gordon ought to have conſulted, ſo plainly prove it foreign to the purpoſe.

In 1591, Thomas Lord Boyd made a reſignation of his whole eſtate in the hands of the King.

Upon this the King granted him a charter of that eſtate, containing a *Novodamus*, and an erection of the whole into one free lordſhip and free barony, to be called "*Dominium et baronia* de Kilmarnock."

This grant ſtands limited, "præfato Thomæ Domino Boyd, in libero tene-"mento, ſive vitali redditu, pro omnibus ipſius vitæ diebus, et ſæpefato Ro-"berto Magiſtro de Boyd, ſuo filio ſeniori, ac *hæredibus maſculis de corpore* "*ſuo*."

There follows a long ſubſtitution in favour of *heirs-male* to the excluſion of *heirs-general*.

Robert Lord Boyd, the great-grandſon of Thomas Lord Boyd, died in 1640 without male-iſſue.

To him his uncle James was retoured, "*hæres maſculus*, *ratione tallię*, in "terris, dominiis, et baronia de Kilmarnock."

He took both eſtate and dignity by the charter 1591, "*ratione tallię*."

The ſiſter of Robert Lord Boyd having no right to the *dominium et baronia*, could have no right to the dignity.

Roſs. 1649.

II. *ROSS.*

p. 17. "This is an ancient peerage, of which the limitations are not known. "William Lord Roſs died ſome time before the year 1649, leaving a "granduncle, William, and ſiſters. His granduncle took the peerage, "to the excluſion of the ſiſters of the deceaſed."

ANSWER.

As early as 1548, the family-eſtate, *viz.* the barony of Melvill, *&c.* upon the reſignation of Ninian Lord Roſs, was limited, by a royal charter, "Jacobo "Roſs, filio legitimo Niniani Domini Roſs de Halkhead, *et hæredibus ſuis* "*maſculis* quibuſcunque."

In conſequence of this limitation, "Willielmus nunc Dominus Roſs de Halk-"heid et Melvill," was retoured, in 1649, to be "legitimus et propinquior *hæ-*"*res maſculus* dict. quondam Willielmi Domini Roſs, ejus fratris nepotis, in "terris, dominio, et baronia de Melvill," &c.

Sir Robert Gordon mentions this retour, but omits the lands, lordſhip, and barony, to which it relates.

He alſo mentions the retour of Mrs Mary Roſs, as one of the heirs-parceners of

of Robert Lord Roſs her brother; but he omits the ſubject of that retour. She is retoured heir to her brother, "in terris eccleſiaſticis et gleba rectoria eccleſiæ parochialis de Melvill." Reaſon I. Preſump. 5.

This was a ſubject totally diſtinct from the *dominium de Melvill.* In all probability it was acquired after the Reformation, and conſequently was no part of the eſtate of Ninian Lord Roſs. It therefore deſcended to heirs-general in the common courſe of ſucceſſion, while the *dominium de Melvill, &c.* deſcended by the charter 1548, together with the honours, to the heir-male.

12. *SEMPILL.*

Sempill. 1685.

p. 18. "Robert Lord Sempill, who died in the end of the laſt century, left "a daughter Anne, to whom he had deviſed his eſtate; but not having "reſigned the peerage in her favour, ſhe could not take the peerage. "The King conferred this peerage of new on the heirs-male of Lady Anne "Sempill, by Mr Abercombie of Fetterneir, her huſband; whom failing, on her heirs-male of any other marriage. But as an heir-male of "the family exiſted, it became neceſſary to procure his conſent to the "tranſmiſſion of the peerage; which he accordingly gives, and Mr A-"bercrombie is created Lord Glaſsford for life."

ANSWER.

The evidence produced for all this, is a patent of the honours of Glaſsford to Francis Abercrombie of Fetterneir, bearing, That Robert Lord Sempill had limited his *honours* and eſtate, failing heirs-male of his own body, to Lady Anne Sempill, his eldeſt daughter, then wife of Francis Abercrombie of Fetterneir. This ſettlement the King ratified; and alſo conferred on Francis Abercrombie the title of *Lord Glaſsford* for life.

The patent alſo ſets forth, That Robert Sempill, heir-male of Robert Lord Sempill, had reſigned, in favour of Lady Anne Sempill, all title, right, or *pretence of right* whatever, which he had, or could pretend, to the title of Lord Sempill.

How this narrative ſhould prove, that the heir-general did not take the peerage, or that the remoter heir-male did, is beyond comprehenſion.

According to Sir Robert Gordon, the eldeſt daughter of Robert Lord Sempill could not originally take the peerage. A renewal of the peerage to her iſſue-male, was certainly no patent to her; and yet it is certain, that ſhe always bore the title of *Baroneſs of Sempill*, and that her ſon did not till after her death.

13. *FRASER of LOVAT.*

Lovat. 1730.

p. 19. "This peerage was enjoyed by Hugh Lord Fraſer of Lovat in the end "of the laſt century. Upon his death, his daughter Æmilia Fraſer aſſu-"med.

Reaſon I. Preſump. 5.

" med the title of *Lady Baroneſs Fraſer*. But Simon Fraſer, the " heir-male, claimed the peerage in the court of ſeſſion in Scotland, " and obtained judgement for him."

ANSWER.

This judgement, though pronounced by a moſt incompetent court, and upon pleadings incredibly looſe and inaccurate, will not aid Sir Robert Gordon.

The ancient inveſtitures of the barony and *dominium* of Lovat, ſo far back as 1539, ſtood limited to Hugh Lord Fraſer of Lovat, and " *hæredibus ſuis maſ-* " *culis*."

Lord Bankton remarks, that upon this charter to *heirs-male*, the court of ſeſſion adjudged the title to Simon Fraſer, the *heir-male* (*k*).

And conſequently had the ancient inveſtitures ſtood limited to *heirs-general*, a different judgement muſt have been pronounced.

Borthwick. 1762.

14. *BORTHWICK.*

p. 19. " In 1681, John Lord Borthwick enjoyed the peerage: he left heirs- " female, who never pretended any right to it. *Evidence*, Retour 26th " January 1681. " Quod quondam Johannes Dominus Borthwick, a- " vunculus Johannis Dundas de Harvieſtoun, obiit veſtit. in terris de " Harvieſton, &c. et quod dict. Johannes Dundas eſt legitimus et pro- " pinquior hæres dict. quondam Johannis Domini Borthwick, ſui avun- " culi. The Houſe of Lords, in 1762, decreed the peerage to a re- " mote heir-male, without calling the heirs-female to be heard for their " intereſt."

ANSWER.

That the ancient limitation of the *barony* of Borthwick was to *heirs-male*, is proved by a royal charter in 1538 to William Lord Borthwick, and his *heirs-male*, and by another charter 1543 to John Lord Borthwick, and his *heirs-male*.

The ſervice 1681, of John Dundas, to John Lord Borthwick, who died in 1672, is not in the barony of Borthwick, but in a ſeparate parcel of lands called *Harvieſtoun*.

There was no oppoſition made by the heir-general to the claim of Henry Lord Borthwick. Upon the footing of the charters 1538 and 1543, there was no ground for oppoſition.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*k*) Vol. 1. p. 52.

To

To all this it might be added, if neceſſary, that there was no evidence before the Houſe of Lords, of the exiſtence of an heir-female in 1762. Reaſon I. Preſump. 5.

15. *ANGUS.* Angus. 1379.

p. 21. " This peerage *failed* with Thomas Earl of Angus. He left two " daughters. Margaret, the eldeſt, was married to William Earl of Dou- " glas. Soon afterwards this peerage has been *renewed* in the perſon of " the Earl of Douglas," &c.

ANSWER.

It is hard to ſay how this narrative of *extinctions* and *renewals* can aid the propoſition, " That the remoter heir-male was preferred to the heir-ge- " neral."

This inſtance is fully explained in chap. 5. § 8.; and it is *there* ſhewn, that the peerage did not fail with Thomas Earl of Angus; that it was enjoyed by his daughter Margaret, and by her tranſmitted to her poſterity.

16. *STRATHERN.* Strathern. 1400.

p. 20. " David Earl of Strathern lived about the middle of the 14th cen- " tury; but died without iſſue-male, leaving a daughter, Eupheme, " married to Sir Patrick Graham. The land-eſtate of the earldom ſtood " limited *hæredibus ſuis*; THAT IS TO SAY, TO HEIRS-MALE; and " failing them, to return to the crown. The peerage *muſt have become* " *extinct* upon Earl David's death," &c.

ANSWER.

Enough, and perhaps more than enough, has been already ſaid as to this inſtance of Strathern. See chap. 5. § 13.

Sir Robert Gordon produces it as one of his *twenty-ſeven* inſtances where the remoter heir-male took in preference to the heir-general; and yet he ſtates the caſe thus: " The peerage *muſt have become extinct* upon Earl David's " death."

17. *DOUGLAS.* Douglas. 1440

p. 18. " Archibald Earl of Douglas, who lived about the middle of the 15th " century, left a daughter and *heir*, Margaret, and yet was ſucceeded in " this peerage by an heir-male of the family."

ANSWER.

Reaſon 1. Preſump. 5. This is ill told. Sir Robert Gordon ſhould have ſaid, That upon the death of William 6th Earl of Douglas, in 1440, his uncle James, Earl of Abercorn, ſucceeded to the honours of Douglas, and not Margaret, his ſiſter, and heir-general.

Margaret was the heir at law of William 6th Earl of Douglas; but ſhe did not ſucceed to the eſtate of the earldom. The limitation of the earldom of Douglas at that period does not appear. There is, however, unqueſtionable evidence, that it has been to *heirs-male*.

In 1409, Archibald Earl of Douglas obtained a charter of the *dominium Vallis Annandiæ*, limited to him and his *heirs-male*.

In 1449, William Earl of Douglas obtained two charters, upon his own reſignation, of the *dominium et regalitas Gallwidiæ*, Foreſt of Ettrick, &c. limited to himſelf and his *heirs-male*.

In 1451, on his own reſignation, he obtained a royal charter of the *comitatus de Douglas*, &c. limited in like manner to himſelf and his *heirs-male*.

Indeed the exorbitant power of James the 7th, and of his ſon William the 8th Earl of Douglas, does of itſelf ſufficiently prove, that the eſtate of the earldom had gone, at that period, to heirs-male.

Such being the ſtate of the fact, this example proves, juſt what the claimant aſſerts, that in ancient times the honour and the eſtate of the earldom went together; to the heir-general, if the limitation in the charter ſtood *hæredibus ſuis*; to the heir-male, if *hæredibus maſculis*.

Crawfurd. 1518.

18. *CRAWFURD.*

p. 18. " David Earl of Crawfurd left a brother John, and a ſiſter Margaret. " John ſucceeded to the peerage; and was ſucceeded therein, not by his " ſiſter Margaret, but by his uncle Alexander, the heir-male of the family; " and Alexander was ſucceeded in the peerage by David his ſon. *Evi-* " *dence*, Royal Charter, 1ſt April 1518, b. 22. N° 45.

ANSWER.

The limitation of the earldom of Crawfurd, at that period, is not preciſely known from record. It appears, however, from that very charter to which Sir Robert Gordon is pleaſed to appeal, that the heir-male ſtood poſſeſſed of the whole lands of the " *comitatus* SEU *dominium* Crawfurdiæ."

This inſtance, therefore, is a further proof of the claimant's propoſition.

19. *ER-*

Reaſon I.
Preſump. 5.

19. *ERROL.*

Errol. 1535.

p. 18. "William Earl of Errol died, without iſſue-male, ſome time before "1562, [r. 1535.], and left only one daughter, Lady Jean Hay; who "became the wife of Andrew Maſter of Errol. This Andrew was the "ſon of George Hay of Logiealmond; who, upon the death of his "[father's] couſin-german, William Earl of Errol, the father of Lady "Jean, ſucceeded as heir-male to the honours of the houſe of Errol, to "the excluſion of Lady Jean."

ANSWER.

William Earl of Errol died before 1535, leaving iſſue a daughter Jean.

Upon this event, James V. granted two charters to George Hay of Logiealmond; the one of the conſtabulary of Scotland, barony of Slains, &c.; the other "terrarum et *dominii* de Errol," &c.

Both charters proceed upon a juſt and grateful recital of the valour and fidelity of the anceſtors of the grantee, "quibus dictus Georgius ſuccedit, tanquam legi-"timus et propinquior HÆRES TALLIÆ," &c.

This clauſe ſhews by what means George Hay ſucceeded to the office of conſtable, and to the family-eſtate.

The original grant by Robert I. was *hæredibus ſuis*; but this grant by James V. ſhews, that a limitation had been afterwards made to certain *heirs of entail*, which carried the office of conſtable, and the family-eſtate, to the heir-male.

In 1542, Andrew, the ſon of this George, obtained, upon his father's reſignation, a royal charter, containing a *Novodamus*, limiting the *comitatus et baronia* de Errol "Andreæ Hay, Magiſtro Erroliæ, filio et hæredi Georgii Comi-"tis Erroliæ, *hæredibus ſuis maſculis* et aſſignatis."

Injuſtice is never to be preſumed; and therefore the exiſtence of the *entail*, which James V. recites as the cauſe of ſucceſſion, muſt be preſumed, although from the injury of time it may have periſhed.

20. *ANGUS.*

Angus. 1556.

p. 21. "Archibald Earl of Angus died without iſſue-male, leaving a daugh-"ter, Lady Margaret Douglas; yet he was ſucceeded in his peerage, "not by his daughter, but by an heir-male of the family of Angus."

ANSWER.

It has been formerly proved, that George Douglas became Earl of Angus in right of his mother Margaret Counteſs of Angus. See chap. 5. § 8.

The

Reaſon I. Preſump. 5. The eſtate and dignity of the earldom of Angus were enjoyed by George Douglas, and his heirs, in the direct line of male ſucceſſion, down to Archibald, 6th Earl of Angus of the Douglas family.

This Earl Archibald married Margaret, the daughter of Henry VII. of England, widow of James IV. King of Scots.

By her he had a ſon James, and a daughter Margaret, married to Matthew Earl of Lennox.

As the Earl of Angus had only one ſon, and as his daughter had married into a great family, it became an object of importance, that Angus ſhould not be ſwallowed up by Lennox.

The Earl of Angus therefore made a reſignation of the whole eſtates of the earldom; and, in 1547, obtained three new charters thereof, each containing certain lordſhips and regalities, to himſelf in liferent, and to James Douglas, his ſon and heir-apparent, " et ſuis *hæredibus maſculis* dicti noſtri conſanguinei, " et ſuis aſſignatis quibuſcunque."

James Douglas died before his father; Archibald Earl of Angus died about 1556.

In 1564, Queen Mary granted a charter, confirming the three charters 1547 to Archibald Earl of Angus, as neareſt *heir-male of tailzie* to James Douglas, his granduncle's ſon (*l*).

This, and the charters confirmed, are the capital charters of the earldom of Angus, next to the charter 1389, formerly recited.

They are the firſt which altered the courſe of ſucceſſion from *hæredes ſui* to *hæredes maſculi*.

Notwithſtanding all this, the pretenſions of the heir-general were eſteemed ſo formidable, that Archibald Earl of Angus, the heir-male, found it expedient, in 1565, to obtain a ratification of his title to the earldom, a renunciation by Lady Margaret Douglas the heir-general, and the conſent of the Earl of Lennox her huſband, and Henry Lord Darnley, their eldeſt ſon and heir-apparent (*m*).

The circumſtances of this caſe were ſo well known, that it is ſtrange that Sir Robert Gordon ſhould have produced it in ſupport of his argument.

Moray. 1570.

21. *STEWART Earl of MORAY.*

p. 20. " An ancient peerage, of which the limitations are unknown. Prior " to 1ſt January 1580. [r. 23d January 1570], the Regent James Earl of " Moray enjoyed this peerage; but by his death the peerage became *ex-* " *tinct*. This peerage was afterwards *revived* by creation in the perſon " of James Stewart [r. ſon of Lord] Doun. Records of parliament, " b. 17. fol. 74. 5th June 1592."

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*l*) *Charter* of confirmation to Archibald Earl of Angus, 11th November 1564. In it the three charters 1547 are ingroſſed.

(*m*) *Contract*, the Earl and Counteſs of Lennox, &c. and the Earls of Angus and Morton, 12th, 13th May, and 26th June 1565.

AN-

ANSWER.

If in this inſtance the peerage became extinct, how can it afford evidence of a remoter heir-male being preferred? Reaſon I. Preſump. 5.

Beſides, every one knows, that James Stewart neither was, nor could be, the heir-male of Regent Moray.

Here the claimant might reſt her anſwer: ſhe will, however, examine the inſtance of Moray; and ſhe will ſhow, that it has been miſunderſtood by Sir Robert Gordon.

There is an intricacy in the grants to the family of Moray, which will require ſome pains to unravel.

The earldom of Moray being in the crown, was granted by Queen Mary to her natural brother James Stewart, Prior of St Andrew's, "et *hæredibus ſuis* "*maſculis de corpore* ſuo legitimè procreandis;" whom failing, to return to the crown (*n*).

On the 7th February 1561-2, Queen Mary granted to him a charter of the earldom of Marr, with the ſame limitations as in the earldom of Moray (*o*).

From ſome political reaſon, it appears, that Queen Mary thought fit that her brother ſhould bear the title of Marr, rather than that of Moray (*p*); and therefore ſhe added to her grant, "ac ſimiliter facimus et creamus dict. Jacobum, "fratrem noſtrum, et *hæredes ſuos maſculos*, *Comites omnibus temporibus fu-*"*turis* de Marr *vocandos*, ac dando eis honorem, dignitatem, locum, et votum "in parliamento."

The earldom of Marr was ſoon after reſtored by Queen Mary, *per modum juſtitiæ*, to John Lord Erſkine; who from that time aſſumed his maternal title of *Marr*.

Upon this the Prior of St Andrew's reaſſumed the title of *Earl of Moray*, conferred on him by the charter 1561-2.

Under that title, in 1563, he obtained from Queen Mary another charter of the earldom of Moray, limited "præfato Jacobo Moraviæ Comiti, et *hæredibus* "*maſculis de corpore ſuo* legitimè procreatis ſeu procreandis;" whom failing, to return to the crown (*q*).

In June 1566, upon his own reſignation, the Earl of Moray obtained another charter from Queen Mary, and her huſband Henry, granting "terras dominii et "comitatûs Moraviæ," to himſelf and his wife, and to the longeſt liver, "et hæ-

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*n*) *Charter*, 30th January 1561-2, Privy-Seal Record.

(*o*) *Charter*, 7th February 1561-2, Privy-Seal Record.

(*p*) There is no place here for extraneous diſſertations on hiſtory, and therefore ſome miſtakes in our hiſtorians concerning this matter muſt remain without correction.

(*q*) *Record* of parliament 1567, ratifying a charter 22d January 1563.

Reaſon I. Preſump. 5. " redibus inter ipſos legitimè procreatis ſeu procreandis; quibus deficientibus, " legitimis et propinquioribus hæredibus, ſeu aſſignatis, quibuſcunque (*r*).

However much the parties may differ in interpreting the *firſt* clauſe of this limitation, they muſt agree in holding, that the *ſecond* comprehends *heirs-general.*

In 1567, the Earl of Moray obtained a ratification in parliament of the charter 22d January 1563, limiting the earldom to himſelf, and the heirs-male of his body, but making no mention whatever of the intermediate charter 1566 (*s*).

Why he ſhould have relinquiſhed the charter 1566, is impoſſible to determine.

It certainly gave his deſcendents a more ample right than the charter 1561-2 or 1563 did.

In 1570-1, the Earl of Moray was ſlain. He left two daughters, but no male iſſue.

Upon the footing of the charters 1561-2 and 1563, and the ratification in parliament 1567, it is plain, that both the eſtate and the dignity of the earldom returned to the crown, in default of heirs-male of the Regent's body.

Nevertheleſs, in 1580, James VI. made a gift to James Stewart, ſon and heir of Sir James Stewart of Doun, of the ward and marriage of Eliſabeth and Margaret, the daughters and heirs of James Earl of Moray deceaſed (*t*).

A few days after, James Stewart married Eliſabeth, the eldeſt daughter, and immediately aſſumed the title of *Earl of Moray* (*u*).

Of his creation there is no evidence; nor indeed does Sir Robert Gordon pretend, that at that time there was any creation.

At that time he could not poſſibly be Earl of Moray in his own right.

He may perhaps have conſidered the charter 1566 as the lateſt title of the family, and as ſufficient to convey the dignity of Moray to his wife.

Unleſs he aſſumed the ſtyle of *Earl of Moray* upon that footing, it was an obvious uſurpation.

In 1592, James VI. and the Scottiſh parliament, ratified to James Earl of Moray, ſon of James Stewart, and Lady Eliſabeth, " the charter by our Sovereign " Lords umquhile [ſometime] father and mother to umquhile James Earl of " Moray, firſt Regent to our Sovereign Lord, and gudſire [grandfather] to the " ſaid James now Earl of Moray, umquhile Dame Agnes Keith, his ſpouſe, " and to the *ſaid umquhile Earl's heirs therein deſigned*, of the Earldom of " Moray, dated 1ſt June 1566, *and all other charters* and infeftments grant- " ed or given to the ſaid umquhile James Earl of Moray, Regent foreſaid, and " to umquhile Dame Eliſabeth Stewart, Counteſs of Moray, his lawful daugh- " ter, and mother of the ſaid James, now Earl of Moray (*v*)."

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*r*) *Record* of parliament 1592.

(*s*) *Record of parliament*, 1567.

(*t*) *Privy-Seal Record.*

(*u*) *Record* Charter, 25th April 1581.

(*v*) *Record of Parliament* 1592.

The

The title-deeds of Regent Moray were, for the reaſon already mentioned, ambiguous and intricate. Reaſon I. Preſump. 5.

But this ratification 1592 rendered the ſucceſſion of the family of Moray utterly inexplicable.

The charter 1566, limited to *heirs-general*, was confirmed; but at the ſame time the other charters, limited *to the heirs-male of the body of Regent Moray*, were alſo confirmed.

It is probable, that this irreconcileable diverſity in the deſtination of ſucceſſion was immediately diſcovered; for James Earl of Moray made no delay in obtaining a charter of the earldom of Moray, limiting the ſucceſſion to heirs-male (*w*).

This charter, joined to poſſeſſion, muſt be the cardinal right of the family of Moray, unleſs theſe has been ſome poſterior reſignation and new grant. As to this, the claimant knows nothing; ſhe has no right to ranſack the archives of the family of Moray.

22. *ANGUS.* Angus. 1588.

p. 21. "Archibald Earl of Angus, who died in 1588, is ſaid to have left "two ſiſters; yet there is evidence, that the peerage went to a remote "heir-male, Sir William Douglas of Glenbervie."

ANSWER.

By the charters 1547 and 1564, formerly mentioned, it is certain, that the earldom ſtood limited to *heirs-male*; and while ſuch heirs exiſted, could not poſſibly go to *heirs-general.*

Sir William Douglas of Glenbervie had a more potent competitor than the ſiſters of the laſt Earl.

In 1588, James VI. grandſon of Lady Margaret Douglas, Counteſs of Lennox, renewed his claim to the earldom of Angus.

He brought a ſuit againſt Sir William Douglas, for reducing the charters 1547, granted to heirs-male in excluſion of the heirs-general, "lineal and lawful, ex-"preſsly againſt the law of God, the law human, and of nature."

Nevertheleſs judgement went for the heir-male againſt the King, in reſpect of Queen Mary's confirmation of the charters 1547, and of the renunciation by the Counteſs of Lennox (*x*).

Facts ſo univerſally known, ought not to have been overlooked by Sir Robert Gordon.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*w*) *Record* Charters, b. 46. N° 383.

(*x*) *Decreet-abſolvitor*, Sir William Douglas againſt the King, 7th March 1588-9.

Reaſon I.
Preſump. 5.
Athole. 1595.

23. 24. *ATHOLE.*

p. 19. " The limitations of this peerage are unknown. Prior to 1595 it was " enjoyed by John Earl of Athole. He left no heir-male, but ſeveral " daughters. Mary, one of his younger daughters, was married to Lord " Innermeath. Dorothy, his eldeſt daughter, was married to William " Earl of Tullibardin. By the failure of heirs-male, the peerage became " *extinct*. In order to revive it, James VI. created Lord Innermeath, " who had married the younger daughter, Earl of Athole. *Evidence*, " Charter, 6th March 1595, b. 61. N° 19.

" This peerage became *extinct* a ſecond time in the perſon of James " Earl of Athole, the ſon of the laſt-mentioned Lord Innermeath. " Charles I. therefore *revived* it in the perſon of John Earl of Tullibar- " din, who had married Dorothea, the eldeſt daughter of John Earl of " Athole; in whom the ancient male line of Stewart Earl of Athole had " failed. *Evidence*, Royal Charter, 7th February 1629, b. 52. N° 89.

ANSWER.

Here again, in ſupport of the propoſition, " That the remoter heir ſucceed- " ed," two inſtances are produced; in each of which it is ſaid, that there was *no* heir-male; that the peerage had become *extinct*; and that it was *revived* by patent.

How far the conſtant repetition of this error is excuſable, muſt be ſubmitted to ſuperior judgement.

Thoſe two inſtances are not only foreign to the purpoſe, but alſo totally miſ-underſtood.

The original charter of the *comitatus Atholiæ*, was granted by James II. to his brother-uterine Sir John Stewart.

It is limited to him, " *et hæredibus ſuis maſculis de corpore ſuo* legitimè pro- " creatis ſeu procreandis;" whom failing, to return to the crown (*y*).

Sir Robert Gordon, therefore, ought not to have ſaid, that *the limitations of this peerage are unknown*.

John Earl of Athole, the laſt deſcendent in the male line of Sir John Stewart, died in 1594, without iſſue-male.

He left ſeveral daughters; particularly, 1. Dorothy, the wife of William Earl of Tullibardin; by whom ſhe had a ſon, *John Murray*; 2. Mary, the wife of *James Stewart*, ſon of John Lord Innermeath.

By the death of John Earl of Athole, the earldom of Athole, in conſequence of the original limitations, returned to the crown.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*y*) *Record* Charters, b. 10. N° 7.

In

In thoſe circumſtances it was that James VI. made the grant 1595 to John Lord Innermeath. Reaſon I. Preſump. 5.

This grant is ſo miſerably curtailed in the *Supplemental Caſe*, that it becomes neceſſary to tranſcribe it in a note (*z*).

It will be remarked, that a clauſe occurs in it which the *Supplemental Caſe* has expreſſed by an *&c.* " De quo, et [per] *ſpeciales proviſiones tallie conten-* " *tas in antiquis cartis et infeofamentis per noſtros nobiliſſimos progenitores,* " *prædeceſſoribus dicti quondam* Johannis Atholiæ *Comitis de prædict. comitatu,* " terris, et aliis ſubſequen. factis et conceſſis eidem liberè, reverſæ ſunt, et nunc " nobis pertinent, et in manibus noſtris, et ad noſtram diſpoſitionem, devene- " runt."

PROOFS, AUTHORITIES, and ILLUSTRATIONS

(*z*) " Jacobus, &c. Sciatis, quia nos nunc poſt noſtram ætatem triginta annorum " completam, et omnes noſtras revocationes ſpeciales et generales intelligentes, quod totæ " et integræ terræ et comitatus de Athole, aliaque ſubtus ſcript. quæ perprius noſtro " quondam chariſſimo conſanguineo Joanni Atholiæ Comiti, proximè defuncto, et ſuis " prædeceſſoribus, hæreditariè pertinuerunt, nunc in manibus noſtris, per deceſſum dicti " quondam Joannis Atholiæ Comitis, et ſuorum prædeceſſorum, abſque hærede vel hæ- " redibus maſculis nunc ſuperſtitibus legitimè de eorum corpore procreatis, devenerunt; " ex quo, et ſpeciales proviſiones talliæ contentas in antiquis cartis et infeofamentis per " noſtros nobiliſſimos progenitores, prædeceſſoribus dicti quondam Joannis Atholiæ Co- " mitis, de prædict. comitatu, terris, et aliis ſubſequend. factis et conceſſis eidem liberè, " reverſæ ſunt, et nunc nobis pertinent, et in manibus noſtris, et ad noſtram diſpoſitio- " nem, devenerunt: Nos tamen memoriæ repetentes et intelligentes, valde perutile et ex- " pediens nobis, et ſucceſſoribus noſtris, ac reipublicæ noſtri regni, fore, ut domus et " familia dicti comitatûs de Athole remaneat et continuetur, et alius vir nobilis ejuſdem " cognominis et ſanguinis, eodem ſtatu et loco dignus, eidem provideatur, unde nos, et " ſucceſſores noſtri, nullo tempore affuturo, ejuſdem honorabili et maximè egregio ſer- " vitio nobis, et ſucceſſoribus noſtris, per Atholiæ pro tempore Comites, tam infra reg- " num noſtrum, quam in exteris nationibus, præſtito et impenſo deſtituamur; ac etiam " certam cognitionem habentes, chariſſimum noſtrum conſanguineum Joannem, nunc Do- " minum de Innermeath, virum nobilem antiquiſſimæ familiæ et cognominis de Stewart, " et dictum quondam Atholiæ Comitem, et ſuos prædeceſſores proximè ſanguine attin- " gentem, et maximè idoneum hujuſmodi notabile et honorabile ſervitium nobis, et ſuc- " ceſſoribus noſtris, præſtandum et ſupplendum; ideo, ac pro bono, fideli, et gratuito " ſervitio nobis, noſtriſque prædeceſſoribus, per dictum Joannem, Dominum de Inner- " meith, ſuoſque prædeceſſores, præſtitò et impensè, ac pro diverſis aliis bonis cauſis et " conſiderationibus nos movent. ex certa ſcientia, et proprio motu, dedimus, &c. dicto " Joanni, Domino de Innermeath, ſuiſque hæredibus maſculis de corpore ſuo legitimè " procreatis ſeu procreandis; quibus deficien. nobis, noſtriſque ſucceſſoribus, liberè re- " verten. totum et integrum comitatum de Athole, ac omnes et ſingulas terras ejuſdem " comitatûs, cum ſuis pertinen." &c.——which his Majeſty of new erects, &c. " in u- " num liberum comitatum, dominium, et baroniam, præfato noſtro prædilecto conſan- " guineo Joanni, Domino de Innermeath, ſuiſque hæredibus maſculis prædictis, comita- " tum de Athole omni tempore affuturo nuncupand. dando et concedendo præfato noſtro " conſanguineo Joanni, Domino de Innermeath, ſuiſque hæredibus maſculis prædictis, o- " mni tempore affuturo, titulum, nomen, honorem, gradum, et ſtatum Comitis, impo- " ſterum Comitis Atholiæ nuncupand. cum omnibus privilegiis, dignitatibus, et immuni- " tatibus, ad Comitem pertinen." &c.——6to Martii 1595.

Reaſon I. Preſump. 5. The limitation in the original grant to Sir John Stewart ſhews what were the "*ſpeciales proviſiones tallie*," in conſequence of which the earldom of Athole had returned to the crown.

According to the practice eſtabliſhed during the reign of James VI. the grant 1595 ſpecially conferred "titulum, honorem, gradum et ſtatum Comitis A-"tholiæ."

Here again the *Supplemental Caſe* omits the limitations by the grant 1595. The eſtate and title are limited to John Lord Innermeath, *ſuiſque hæredibus maſculis de corpore ſuo;* whom failing, to return to the crown.

John Lord Innermeath, and Earl of Athole, was ſucceeded in his eſtate and title by his ſon James. James died without iſſue-male; and thus both returned again to the crown, by virtue of the limitation in the grant 1595.

The manner of the renewal of the peerage by Charles I. is ſingular.

John Earl of Tullibardin was the ſon and heir of William Earl of Tullibardin, and Lady Dorothy Stewart, the eldeſt daughter of John Earl of Athole, deceaſed in 1594.

He obtained himſelf ſerved and retoured neareſt heir to Sir John Stewart, the brother-uterine of James II.

Charles I. granted letters-patent, confirming this ſervice and retour, in the following words. "And we being moved, from honour and conſcience, to ra-"tify and confirm the foreſaid title, right, and ſtyle, of the honour and dignity "of Earl of Athole, in the perſon of the foreſaid John Murray; therefore, &c. "we ratify and confirm, &c. the foreſaid ſervice and retour, dated, at Perth, "6th Auguſt 1628, whereby the foreſaid John Murray, *now Earl of Athole*, "was found, declared, ſerved, and retoured, in right of his mother, neareſt and "lawful eldeſt heir of the late John Earl of Athole, brother-uterine of the late "King James II. (*a*)."

The grant contains alſo a *Novodamus* of the title and dignity, "*without pre-"judice*" to the Earl's right as heir-general to John Stewart, firſt Earl of Athole.

This retour, as heir-general to the firſt Earl of Athole, might have carried any ſeparate eſtates acquired by him, or by his deſcendents; but it could never carry the *comitatus* of Athole, which ſtood expreſsly limited to the heirs-male of his body.

It is therefore manifeſt, that Charles I. miſunderſtood the fact, when he conſidered himſelf as bound, in honour and conſcience, to ratify this retour,

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*a*) "Et nos, ex honore et conſcientia, ad titulum, jus, et ſtylum dicti honoris et digni-"tatis Comitis Atholiæ, in perſona præfati Johannis Murray, ratificandum et confirman-"dum, moti; igitur, &c. ratificavimus et confirmavimus, &c. dictam deſervitionem et "retornatum, unde præfatus Johannes Murray, *nunc Atholiæ Comes*, proximus et legi-"timus hæres ſenior, ex parte matris ſuæ, antedicti quondam Johannis Atholiæ Comitis, "fratris uterini dicti quondam Jacobi Regis Secundi, repertus, declaratus, deſervitus, et "retornatus eſt, de data apud Perth, 6to die menſis Auguſti, an. Dom. 1628." *Diploma* Johannis Comitis Atholiæ, 17th February 1629. Records, b. 52. N° 89.

together

together with the dignity of Athole, in the perſon of John Earl of Tullibardin. Reaſon I. Preſump. 5.

Indeed the Earl of Tullibardin himſelf ſeems to have doubted of the efficacy of this ratification; and therefore he moſt judiciouſly obtained a new patent of the honours of Athole.

The ratification of the retour ſhews what was underſtood to be law at that time; but it could not convey the earldom of Athole, which had already devolved to the crown by the limitations in the grant 1595.

The two inſtances of Athole, being explained, are undoubtedly foreign to the purpoſe for which they are quoted by Sir Robert Gordon.

25. *GLENCAIRN.*

Glencairn. 1670.

p. 17. 18. "This is an ancient peerage, the limitations of which are unknown. "Alexander Earl of Glencairn, who died in May 1670, left a brother "John, who ſucceeded him in the peerage, to the excluſion of Alexander's daughter, Margaret Counteſs of Lauderdale. *Evidence*, Retour "of John Earl of Glencairn, to his brother Alexander, 29th September "1670, b. 30. fol. 103."

ANSWER.

The retour quoted is a retour of John Earl of Glencairn, as *heir-male* to his brother. It proceeds upon a royal charter of the family-eſtate, viz. the barony of Kilmaurs, &c. limited "Willielmo, nunc Comiti de Glencairn, Domino Kil-"mawers, &c. *hæredibuſque maſculis* tunc de ſuo corpore legitimè procreand.; "quibus deficient. dict. quondam Willielmo Domino Kilmawers, hæredibus ſuis "maſculis et talliæ, in infeofamento terrarum de Glencairn ſpecificat." 27th July 1642. The caſe of Glencairn is fully treated of elſewhere.

26. *MORAY.*

Moray. 1702.

p. 20. "The limitations of this peerage are unknown. James Lord Down, "ſon and heir-apparent of Alexander Earl of Moray, died ſome time "prior to the year 1702, without iſſue-male, but leaving daughters. "The heir-male of the family, Lord Down's brother, ſucceeded to the "peerage, to the excluſion of his nieces."

ANSWER.

This has been already obviated. The charter of the earldom of Moray in the reign of James VI. being limited to *heirs-male*, neceſſarily carried the ſucceſſion to the *heir-male*.

Reaſon I.
Preſump. 5.

Caſſilis. 1759.

27. *CASSILIS.*

p. 19. "An ancient peerage, of which the limitations are not known. It "was enjoyed by John the 8th Earl of Caſſilis, who died in the year 1759, "without iſſue. Sir Thomas Kennedy, his heir-male, and the Earl of "March, his heir of line, both claimed the peerage. The Houſe of "Lords decreed it to Sir Thomas Kennedy."

ANSWER.

In the caſe of Caſſilis, it was proved, that David Lord Kennedy became Earl of Caſſilis in 1509. Had any inſtrument of creation appeared, the deſcent of the peerage muſt have been determined by it; but as none appeared, there was a neceſſity of determining the deſcent of the peerage by ſome legal preſumption.

It appeared by two charters of Robert III. in 1404 and 1405, and by four charters of James III. in 1450, that the lands and eſtate of Caſſilis were expreſsly limited to *heirs-male*, in excluſion of females. It appeared, that there was a charter to David Kennedy in 1501, upon his father's reſignation, *et hæredibus ſuis:* but then there was added, *ſecundum tenorem antiquarum infeodationum dict. terrarum eis deſuper confect.* Every one knows, and it is laid down by Sir Robert
p. 3. Gordon, "That the meaning of *hæredes ſui* is governed by the inveſtiture to "which they relate;" and here they related to inveſtitures ſtrictly *male*.

It alſo appeared, that thoſe heirs-male were, by one of the charters of James III. declared to be the head of the potent tribe of the Kennedys.

David Lord Kennedy, the firſt Earl of Caſſilis, could never have intended to ſeparate his honours from his whole eſtate, and from the darling right of *chieftainſhip*, in thoſe days more eſteemed, and indeed more eſtimable, than any land-eſtate (*b*).

The Sovereign could never have intended to beſtow an empty title on the *heirs-female*, while the whole eſtate, and the chieftainſhip, were deſcendible to the *heirs-male*.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*b*) This was a valuable right, even independent of the power and influence which attended the *Chief*. The eſtates of the family of Caſſilis lay in Galloway and Carrick. Perhaps ſome modern lawyers may know little of the *caupes* of Galloway and Carrick. They are deſcribed by Skene, *De verborum ſignificatione*, in the following words. "Caupes, "Calpes, in Galloway and Carrick, ſignifies ane gift, ſik as horſe, or uther thing, quhilk "ane man in his awin lifetime, and *liege pouſtie*, gives to his maiſter, or to onie uther man "that is greateſt in power and authoritie, and *ſpeciallie to the head and chief of the clann*, "for his maintenance and protection."—Theſe *caupes* were not ſuppreſſed before parl. 22. c. 21. James VI. 1617.

Neither

Neither could any *heir-female* have been found, in thoſe days, willing to accept an empty title of honour, without power, influence, or eſtate. Reaſon I. Preſump. 5.

From the limitation of the land-eſtate, and right of chieftainſhip, to *heirs-male*, there aroſe a preſumption for the deſcent of the titles of honour to *heirs-male*.

The claimant, therefore, will hold it to be a rule of law, eſtabliſhed in the caſe of Caſſilis, "That in deſcendible honours, where the inſtrument of creation "is loſt, ſo that the limitation therein contained does not appear, nor is ſupplied "by other evidence, the legal preſumption is in favour of the heir to whom the "land-eſtate ſtood limited at the time of the creation, whether heir-male or "heir-general."

A rule eſtabliſhed upon ſuch a preſumption will maintain itſelf as long as the law of Scotland remains.

The claimant has no opportunity of knowing with certainty every argument urged in the caſe of Caſſilis.

Although ſhe knew them all, ſhe is not at liberty to mention any of them.

She has all poſſible deference for the judgement of the ſupreme court; but ſhe may obſerve, and ſhe hopes without offence, that every topic employed before judgement is not of equal authority with the judgement itſelf.

The ſucceſſion to the peerage of Caſſilis was no object to the Noble Perſon who bore the character of *heir-general*.

It is certain, that the argument for him was conducted with little attention; much was overlooked, and much admitted without cauſe.

Although the argument had been more carefully conducted, the event would ſtill have been the ſame: for there was nothing that could be oppoſed to the legal preſumption raiſed from the limitation of the eſtate and chieftainſhip to heirs-male.

Upon this footing, therefore, the claimant does hold, and ever will hold, the deciſion in the caſe of Caſſilis to be unexceptionably juſt.

28. *CAITHNESS.* Caithneſs. 1767.

p. 18. "This is an ancient peerage, the limitations of which are not known. "Alexander late Earl of Caithneſs died a few years ago, without male "iſſue. His daughter, Counteſs Fife, does not claim the peerage; and "there is now a competition *for it* in dependence, betwixt two remote "heirs-male of the family, [*i. e.* between two perſons claiming the cha-"racter of *heir-male*]. *Evidence*, Information given to the court of "ſeſſion, 20th June 1769, by William Sinclair of Ratter, againſt James "Sinclair in Reis."

ANSWER.

It is ſomewhat ſingular to ſay, "That there is a competition for the peerage of Caithneſs depending before the court of ſeſſion." The judges of that court are

Reaſon I. Preſump. 5. not ſo ignorant of their duty, as to ſuffer ſuch a competition to be heard before them. They were called upon to determine the fact, *Who* was heir-male to the late Earl of Caithneſs? With the conſequences of that fact they have no concern.

It is not ſtrange that Counteſs Fife does not claim the peerage of Caithneſs, ſince ſo late as 1698 the peerage devolved to her grandfather, as *heir-male*, in preference to the *heir-general.*

The cauſe of this preference might have been diſcovered from record, had Sir Robert Gordon made reſearches equally accurate as extenſive.

William Sinclair, Earl of Caithneſs in the fifteenth century, was twice married: 1. To Lady Margaret Douglas, daughter of Archibald 4th Earl of Douglas. By her he had a ſon, William; who obtained from his father the lands of Newburgh in Aberdeenſhire (*c*). He was the anceſtor of Lord Sinclair's family.

William Earl of Caithneſs, married, 2. Marjory, daughter of Alexander Sutherland of Dunbeath (*d*).

By her he had two ſons: 1. Sir Oliver, who obtained from his father a charter of the baronies of Roſlin, Herbertſhire," &c. (*e*).

2. William, for whoſe ſake the Earl of Caithneſs reſigned his earldom.

In conſequence of this extraordinary predilection, James III. granted "Wil-
"lielmo Sinclair, filio Willielmi Comitis Cathaniæ, et Domini de Sancto Claro,
"inter ipſum et Marjoriam, Comitiſſam Cathaniæ, ſponſam ſuam, genito, o-
"mnes et ſingulas terras comitatûs Cathaniæ, &c. Tenend. et habend. dicto
"Willielmo Sinclair, filio dicti Willielmi Comitis Cathaniæ, et hæredibus ip-
"ſius Willielmi filii quibuſcunque, de nobis," &c. (*f*).

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*c*) Henry, ſon of this William Sinclair of Newburgh, obtained the following declaration in parliament. "Anent [concerning] Sir Henry Sinclair, that our Sovereign Lord,
"with the advice and deliverance of the eſtates of his parliament, declares, that ſine
"[ſince] the ſaid Sir Henry's grantſchier and father, Lords Sinclair for the time, are de-
"ceſſit, and the ſaid Sir Henry rightwiſe heritor to them, *that he is chief of that blude,*
"and will therefore that he be called *Lord Sinclair* in time to come, with all dignities, e-
"minences, privileges, *tenands, tenandries, belangand tharto, after the form of the char-*
"*ters and evidents made tharupon.*" *Records* of parliament, b. 4. fol. 113. 26th January 1488-9.

(*d*) *Will and ſettlement* of Alexander Sutherland of Dunbeath, in favour of his daughter Marjory, and William Earl of Orkney and Caithneſs, and the bairns gottin and to be gottin betwixt them, &c. 15th November 1456, produced by the claimant. The counſel for Sir Robert Gordon have had occaſion to be acquainted with this lady. She is the *Phantom of Sutherland,* raiſed up to combat one propoſition in law, That *hæredes ſui* meant *heirs-general*; and another in fact, That the earldom of Sutherland was deſcendible to heirs-general.

(*e*) *Charter* William Earl of Caithneſs, to Sir Oliver Sinclair, his ſon, procreate betwixt him and Dame Marjory Sutherland, his wife, 9th September 1476. It has been ſometimes averred, that Sir Oliver was the *ſecond* ſon of the ſecond marriage. This, however, is nothing to the preſent queſtion.

(*f*) *Record* Charters, b. 7. N° 393. 7th December 1476.

Hal

Had the grant of the earldom continued upon the footing of this charter, it would, beyond all doubt, have deſcended to *heirs-general.* But George, the grandſon of this William Sinclair, reſigned the earldom into the hands of James V.; and the King granted it to John Sinclair, the heir-apparent of George, "et *hæredibus ſuis maſculis*, tenend. *in libero comitatu et dominio* (*g*)." Reaſon I. Preſump. 5.

From that time the ſucceſſion went in the male line.

The claimant has thus ſtated the twenty-eight inſtances produced for Sir Robert Gordon in ſupport of his *fifth* preſumption, and ſhe has made anſwers to each of them.

According to the plan formerly laid down, ſhe will now ſtate the reſult of the whole.

FIRST CLASS.

Three inſtances, where neither the heir-female, nor the remoter heir-male, ſucceeded in that character.

1570. 21. Moray. | 1595. 23. Athole. | 1628. 24. Athole.

Five inſtances, where the heir-female, and her iſſue, did ſucceed *both* to the eſtate and dignity.

1519. 2. Haliburton.
1550. 5. Herreis.
1685. 12. Sempill.

1379. 15. Angus.
1400. 16. Strathern.

Twenty inſtances, where the dignified fief ſtood limited to *heirs-male*, and where accordingly the remoter heir-male did ſucceed to the dignity and to the eſtate, if exiſting.

1466. 1. Lorne.
1531. 3. Home.
1541. 4. Gray.
1557. 6. Fleming.
1591. 7. Hay of Yeſter.
1609. 8. Lindeſay of Byres.
1628. 9. Gray.
1640. 10. Boyd.
1649. 11. Roſs.
1730. 13. Fraſer of Lovat.

1762. 14. Borthwick.
1440. 17. Douglas.
1518. 18. Crawfurd.
1535. 19. Errol.
1556. 20. Angus.
1588. 22. Angus.
1670. 25. Glencairn.
1702. 26. Moray.
1759. 27. Caſſilis.
1767. 28. Caithneſs (*h*).

In all twenty-eight inſtances *in ſupport* of the preſumption of Sir Robert Gordon.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*g*) *Record* Charters, b. 29. N° 270. 2d October 1545. Here it may be obſerved, in paſſing, that if ſuch reſignations, and new grants of the *comitatus*, did not carry the title of dignity, there have been *eight* ſucceſſive Earls of Caithneſs all uſurpers; and that the peerage does at this day belong to the heir of Sir Henry Sinclair of Newburgh. This is one of the many extravagant conſequences of Sir Robert Gordon's hypotheſis.

(*h*) In propriety of ſpeech, this example ought to be omitted; for that the claim of the heir-male mentioned by Sir Robert Gordon has not been heard and allowed by the Houſe of Lords. The claimant only mentions it as an inſtance where the heir-female ſtood excluded by reaſon of the limitations in the charter.

In

Reaſon I. Preſump. 5. p. 26. In ſupport of his own argument, and in anſwer to that of the claimant, Sir Robert Gordon obſerves, "That there are many prece-"dents, where, though the heir-female took the eſtate, yet by the fai-"lure of heirs-male the peerage extinguiſhed."

ANSWER.

The precedents mentioned are *eight* in number; and they ſhall be examined with all poſſible brevity.

1. *FLEMING.*

p. 26. "The inveſtitures of this eſtate were not to *heirs-male*, and yet the "peerage went to them. Malcolm Lord Fleming had two ſons, James "and John. James had a daughter, named *Jean*, who got the family-"eſtate of Thankerton and Biggar. *Charter*, 30th October 1583. John "ſucceeded to the peerage in preference to Jean the heir of line."

ANSWER.

For proving his propoſition, That the peerage *extinguiſhed*, Sir Robert Gordon brings evidence that *it deſcended to the heir-male*.

It has been already ſhown, that James Lord Fleming made over the whole family-eſtate to his brother John, and his heirs and aſſignees, under a condition to return to the heirs-male of his own body; and that John, in 1557, obtained a royal charter confirming this grant.

Thankerton and Biggar are expreſsly contained in the grant by James to his brother; and in the charter 1557, confirming that grant. It is incumbent, therefore, on Sir Robert Gordon to ſhew how they could belong to Jean Fleming in 1583. By the charter quoted it appears, that her right to thoſe eſtates, of whatever nature it may have been, was not through her father Lord James, but through her grandfather Lord Malcolm; and this of itſelf ſhews, that ſhe did not ſucceed to her father. It has probably been ſome collateral right in Malcolm Lord Fleming, which was ſuppoſed to ſubſiſt in his *heir-general*, as not being ſpecially conveyed by James Lord Fleming to his brother John.

2. *LENNOX.*

p. 26. "Eſme Stewart was created a Duke on the 5th of Auguſt 1581, by a "creation, intitled, *Conſtitution of the earldom of Lennox in a Dukerie*,

"produced,

" produced, copied from the *Earl of Hadington's collections* from the Reaſon I.
" records, Advocates Library at Edinburgh, A 4. 20. p. 460. In con- Preſump. 5.
" ſequence of this creation, he ſat in parliament as Duke of Lennox,
" 28th November 1581.

" The charter founded on by Lady Eliſabeth, in favour of Eſme Duke
" of Lennox and his heirs-male, is poſterior to both thoſe periods, be-
" ing dated 13th December 1581; and inſtead of being the creation of
" a peerage, is only the erection of the eſtate into a dukedom.

" The proofs of the excluſion of the heir-female in this caſe conſiſt of
" two retours: 1. Retour of Charles II. as heir-male to Charles Duke
" of Lennox; 2. General retour of Catharine Stewart, Dominæ Obrien,
" et Baroniſſæ de Clifton, to her brother Charles Duke of Lennox."

ANSWER.

This inſtance proves, what the claimant has always averred, that the charter regulated the ſucceſſion to the peerage, as well as to the eſtate.

The conſtitution of the earldom of Lennox into a dukedom, ingroſſed in Hadington's MS. contains not only ſuch erection, but alſo a creation, whereby the Earl of Lennox is made *Duke of Lennox*. The creation is perſonal, without any mention of heirs; and the King " ordains him to be inveſted there-
" in, with all ſolemnities requiſite."

Immediately after this the King, with advice and conſent of the three eſtates aſſembled in parliament, granted him a charter, erecting the earldom of Lennox, and ſeveral other lordſhips, baronies, offices, regalities, &c. " in unum
" liberum ducatum, comitatum, baroniam, et regalitatem, nuncupand. omni
" tempore affuturo, Ducatum de Lennox;" limited thus: " Eſmo Duci de
" Levenox, Comiti Dernlie, Domino Tarboltoun, Dalkeith, et Aubigny, &c.
" et *hæredibus ſuis maſculis* de corpore ſuo legitimè procreatis ſeu procrean-
" dis; quibus deficien. nobis et ſucceſſoribus noſtris reverſur."

Sir Robert Gordon quotes this as a precedent for proving, " That the heir-
" female took the eſtate, while, by the failure of heirs-male, the peerage extin-
" guiſhed."

Where he diſcovered, that Catharine Lady Obrien took the eſtate of Lennox, or had the ſmalleſt pretenſion to take it, is left with him to explain.

3. *SEMPILL.*

p. 26. " It has been ſhewn, p. 18. note (*i*), that the eſtate of Robert Lord
" Sempill went to his daughter; and that, in order to make the peerage
" go to her, which otherwiſe opened to the heir-male, he reſigned his
" right in the peerage in her favour."

ANSWER.

Reaſon I. Preſump. 5. In note (*i*), p. 18, juſt the reverſe is averred: "That Robert Lord Sempill "*not* having reſigned the peerage in her favour, ſhe could not take it." A ſtrange example of inattention!

It has been formerly ſhewn, that there is *no* evidence of the peerage of Sempill having been deviſed to *heirs-male*, and that there *is* evidence of Lady Sempill having taken both the peerage and the eſtate.

4. *BORTHWICK.*

p. 26. "It has been ſhewn, p. 19. note (*i*), that John Lord Borthwick left "an heir of line, John Dundas, who got the eſtate, of which he died "poſſeſſed. For as to the ancient eſtate of Borthwick itſelf, it was pur- "chaſed by Sir James Dalrymple of Borthwick, and a number of other "perſons."

ANSWER.

Sir Robert Gordon, inſtead of ſhewing, that "the heir-female took the e- "ſtate," juſtly obſerves, that it was ſold off in parcels, to various purchaſers. Indeed he ſeems conſcious that the eſtate of Borthwick, the dignified fief, never deſcended to *heirs-general*.

He obſerves, That part of it was ſold to Sir James Dalrymple. Surely not ſo early as 1681, when the heir-general was retoured in the lands of Harvieſtoun; for at that time Sir James Dalrymple was a lad, a younger brother, and having a father alive.

That the heir-general took the lands of Harvieſtoun is nothing to the purpoſe, unleſs, with all his paradoxes, Sir Robert had advanced this, That every parcel of land acquired by a peer, was by the very deed of acquiſition abſorbed in the dignified fief.

Were it not too ludicrous, the claimant might dwell a little longer on the great propriety of proving, from this precedent, "That the heir-female took "the eſtate; and yet, by the failure of heirs-male, the peerage extinguiſhed;" where there was *no* eſtate for the heir-female to take, where there was *no* failure of heirs-male, and where the peerage was *not* extinguiſhed.

5. *CAITHNESS.*

p. 26. "The late Earl of Caithneſs left not his eſtate to *either* of *his two* "*heirs-male* who are now contending for his peerage."

A N-

ANSWER.

The ancient eſtate of the earldom was carried off ſeveral generations ago by legal diſtreſs; ſo *that* is out of the queſtion. Reaſon I. Preſump. 5.

It is certain that the laſt Earl of Caithneſs did not leave his paternal inheritance, and his own acquiſitions, either to his heir-male, or to his heir-general.

And is not this an admirable precedent for proving, "That the heir-female "took the eſtate, while, by the failure of heirs-male, the peerage extin-"guiſhed?"

6. *HALIBURTON.*

p. 27. "It has been ſhewn, p. 20. note (*i*), that Patrick Lord Haliburton, "upon whoſe death without iſſue-male this peerage became extinct, left "daughters heirs-portioners in his eſtate."

ANSWER.

It has been already demonſtrated, that the peerage did not become extinct by the death of Patrick Lord Haliburton, but that it was enjoyed by his eldeſt daughter, and loſt by the forfeiture of her grandſon, John Earl of Gowrie, in 1600.

7. *HERREIS.*

p. 27. "It has been ſhewn, p. 20. note (*i*), that William Lord Herreis, up-"on whoſe death without iſſue-male the peerage became extinct, left "daughters heirs-portioners in his eſtate."

ANSWER.

It has been ſhewn, that William Lord Herreis left an heir-male, who laid no claim to the title of honour; and that the daughter of Lord Herreis took *both* the eſtate and the title of honour, and tranſmitted *both* to her poſterity.

8. *MORAY.*

p. 27. "It has been ſhewn, p. 20. note (*i*), that upon the death of James "Earl of Moray, Regent, without heirs-male, his peerage became ex-"tinct;

Reaſon I. Preſump. 5.

" tinct; and that he left daughters, who were heirs to him in his eſtate.
" *Further evidence*, Charter by King Henry and Queen Mary, 1ſt June
" 1566; which ſhews, that the Earl of Moray had reſigned the earldom, *i.e.*
" his land eſtate, in favour of his heirs of line; and failing them, to his
" aſſigns."

ANSWER.

Had there been nothing in the caſe of Moray but what Sir Robert Gordon mentions, the claimant would have contended, That this reſignation of the earldom in 1566 was ſufficient to convey the titles of honour to *heirs-general*; and *this* the more eſpecially, becauſe there is neither evidence nor probability, that Lord Down was ever created Earl of Moray.

But the charter formerly mentioned, dated 1563, and ratified in parliament 1567, is what occaſions the intricacy. *It* ſurely was ſufficient to exclude the *heirs-general* altogether.

The only way of accounting for all this, upon the footing of the title-deeds actually exiſting, is to ſuppoſe, that there was an error and a contradiction (*i*); and that all was rectified and reduced into order, by the charter of the earldom in favour of James Earl of Moray, the Regent's grandſon, and his *heirs-male*.

p. 27. Sir Robert Gordon further obſerves, " That there are many inſtances
" where the *eſtate* ſtood limited before, at, or ſoon after, the creation
" of the peerage, ſimply *hæredibus ſuis*, or *hæredibus quibuſcunque*;
" in which either the heir-male ſucceeded to the peerage, in excluſion
" of the female heir of line, or the peerage became extinct by the failure
" of heirs-male." The inſtances here quoted are fourteen out of the twenty-eight quoted under a former head."

ANSWER.

There is nothing ſo fallacious as the uſe of general indefinite terms. The word *eſtate* is of this nature: It may mean the *dignified fief*, ſuch as the barony, lordſhip, or earldom; or it may mean any heritable right, however inconſiderable.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*i*) Men in the higheſt public offices are ſometimes amazingly careleſs about their own private affairs. It is probable, that Regent Moray left the drawing up of the ratification in parliament to the care of ſome man of buſineſs; and that he, by miſtake, made the act to ratify the charter 1563, inſtead of the charter 1566. This ſeems the moſt natural way of accounting for the error: that there *was* an error, is paſt all doubt.

The

The claimant ſuſpects, that ſome recourſe may have been had to the indefinite meaning of the word *eſtate*. Reaſon I. Preſump. 5.

Sir Robert Gordon, inſtead of pointing out the limitations of the *family-eſtate*, has ranſacked the records for charters of detached parcels of land, tenements in boroughs, rocks, annuities, appriſings, ſuperiorities, offices, and every thing elſe wherein a limitation to *heirs-general* appears.

Had the ſubjects contained in thoſe charters been particularly ſpecified, the muſter-roll would have made a moſt uncouth appearance.

1. YESTER.

p. 27. Sir Robert Gordon quotes ſeveral charters, not one of which relates to the lordſhip or barony of Yeſter. One in particular, 12th January 1451-2, is of a *fourth part* of the lands of Yeſter, before it was erected into a barony, and before a *Lord Yeſter* exiſted.

He adds, "That a charter, 18th October 1533, bears, "*hæredibus inter ipſos legitimè procreat. ſeu procreand.*; *quibus deficien. legitimis et propinquioribus dicti Johannis quibuſcunque*; and that it deſerves particular attention, becauſe it marks the oppoſition betwixt *hæredibus* and *hæredibus quibuſcunque*; plainly importing, that the former are *heirs-male*, and the latter *heirs of line*."

ANSWER.

The counſel for Sir Robert Gordon muſt have entertained a mean opinion indeed of the knowledge of thoſe who act for his competitor, when they hazarded ſuch an obſervation.

The oppoſition in the charter is not between *hæredes* and *hæredes quicunque*, but between *hæredes de corpore* and *hæredes quicunque*: and ſurely it does not require great experience in the law of Scotland to underſtand the meaning of this clauſe, "to the heirs of my body; whom failing, to my heirs whatever." *The heirs of my body* are neceſſarily *my heirs whatever*; but *my heirs whatever* are not neceſſarily the *heirs of my body*.

2. BOYD.

p. 27. Sir Robert Gordon obſerves, "That Robert Boyd was created a peer "ſome time betwixt the 5th and 7th year of Q. Mary, [*i. e.* between "1548 and 1550]; and he produces certain charters about that period, "taken by Lord Boyd *hæredibus ſuis*."

ANSWER.

Reaſon I. Preſump. 5. The imagination that the family of Boyd of Kilmarnock was ennobled by Queen Mary, requires no anſwer. See authorities quoted by *Douglas*, Peerage, p. 376. *Kilmarnock*. — Not one of the charters have the ſmalleſt connection with the dignified fief of *Kilmarnock*; they are of the lands of Auchintuarlie, Portincroie, Quyhytinck, &c.

3. *ROSS.*

p. 27. "This peerage was created between 1472 and 1499. In 1490, 1499, "1501, 1502, 1505, 1508, the inveſtitures ſtood limited *hæredibus*, "or *hæredibus et aſſignatis*."

ANSWER.

None of the charters here produced relate to the dignified fief of *Haulkhead*. By a charter in 1508, the barony of Melvil, which had come to the family by the marriage of an heireſs, ſtood limited *hæredibus ſuis;* but even that was altered by the next Lord Roſs.

4. *FLEMING.*

Sir Robert Gordon obſerves, "That the peerage of Fleming was "created before 1472; and he quotes a multitude of charters for pro- "ving, that the inveſtitures of the family, from 1496 to 1541, ſtood "limited *hæredibus ſuis*."

ANSWER.

The only charter of the dignified fief, the barony of *Cumbernauld*, to which Sir Robert refers, is dated in 1539, about *ſeventy* years after the creation of the peerage. This can never prove his propoſition, which reſpects the limitations *before*, *at*, *or ſoon after*, the creation of the peerage.

Reference is alſo made to ſome charters of the baronies of Biggar and Thankerſton; but Sir Robert might have ſeen in the record an older charter of thoſe baronies, *anno* 1508, to Margaret Stewart, daughter of Matthew Earl of Lennox, and the *heirs-male* to be procreated betwixt her and John Lord Fleming; whom failing, to return to Lord Fleming and his *heirs-male*.

Had not this charter been overlooked, the ſection concerning *Fleming* would have dwindled away to nothing.

5. *GLEN-*

5. GLENCAIRN.

p. 28. "The peerage of Glencairn was created in 1488 by letters-patent. Reaſon I. "*Evidence*, Renewed Patent 21ſt July 1637. In 1511 the inveſtitures Preſump. 5. "of the *comitatus* and barony of Glencairn ſtood to *heirs-male*. This "is the firſt charter on record of the inveſtitures of the family-eſtate; "and as it limits the *comitatus* by expreſs name, *hæredibus ſuis*, it de- "ſtroys at once all the Lady Eliſabeth's fine-ſpun argument, That the "preſumption for determining the limitations of the peerage, ariſes "from the limitation of the eſtate in the inveſtitures approaching near- "eſt to the time of the creation of the peerage." *Evidence*, Royal Charter of the *comitatus*, 24th July 1511, b. 17. N° 86. *hæredibus ſuis*. [Sir Robert meant to have added, "that the peerage of Glencairn went "to the remoter heir-male in 1670, in excluſion of the heir-general."]

ANSWER.

The claimant would not conſider her argument as in the leaſt impaired, although two or three inſtances in as many centuries were produced, where from a defect in the records the argument did not preciſely apply.

This caſe of Glencairn deſerves a more exact inquiry than Sir Robert Gordon has beſtowed on it.

Alexander Lord Kilmaurs was faithful to the cauſe of James III. In May 1488 the King granted to him a charter of the *comitatus* de Glencairn. Whether he alſo made him any ſeparate grant, ſhall be inquired hereafter.

On the 11th June 1488, he fell in battle, together with his ill-fated Sovereign.

At the acceſſion of James IV. it was the firſt object of the new government, to void the later grants made by James III.

Accordingly, on the 6th October 1488, a proclamation, formerly iſſued at Scone, was ratified in parliament. By it, beſides other enactments, "all *crea-* "*tions of new dignities* granted ſen the ſecond day of Februar laſt [1487-8], "be umquhile our Soveraine Lordis father," were annulled (*k*).

It is undeniable, that by virtue of this ſtatute, Robert, the ſon of Alexander, ſlain on the 11th June 1488, was reduced to his former rank of Lord Kilmaurs.

But as it was exceedingly problematical, whether the prevailing faction had juſtice on their ſide, the ſeverity of the ſtatute 1488, made in the firſt heat of power newly acquired, was inſenſibly mitigated (*l*).

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*k*) Act. 5. parl. 1. James IV. 1488.

(*l*) Of this, any one converſant in the hiſtory of Scotland will recollect many examples; but the detail would better ſuit a diſſertation than a note.

The

Reaſon I. Preſump. 5. The family of Glencairn, in particular, aſſumed that title, which Alexander Lord Kilmaurs had purchaſed at ſo dear a rate.

After the union of the crowns, the Scottiſh nobility became as jealous of their rank in proceſſions, as their forefathers had been of the right of combating at their Sovereign's ſide, and of dying with him.

In 1606, the Earls of Eglinton and Caſſilis obtained a decree of the privy council, preferring them in the order of parliament to the Earl of Glencairn.

But, in 1609, the Earl of Glencairn obtained a decree of the court of ſeſſion, annulling that preference, for the following reaſon: "That the purſuer's pre-"deceſſor was created Earl of Glencairn by James III. in May 1488; before "which time the defendants cannot ſhew that the dignity of an earldom was "granted to either of them."

Thus the judgement of the privy council ſtood one way, the judgement of the court of ſeſſion another: and at pronouncing this laſt judgement, it is probable that the act 5. parl. 1. James IV. was overlooked.

In 1637, Charles I. removed all doubt and ambiguity, by ratifying the grant of James III. 28th May 1488 (*m*).

To the ancient grant the King gives the appellation of *literæ patentes*, which Sir Robert Gordon tranſlates by the word *patent*. But that this interpretation is liable to juſt exception, the claimant has elſewhere ſhewn.

Unfortunately the grant 28th May 1488 is not upon record. The patent 1637, inſtead of repeating it, holds it as repeated.

From a charter of the *comitatus* of Glencairn in 1511, limited *hæredibus ſuis*, Sir Robert Gordon argues, that the grant 1488 was alſo limited *hæredibus ſuis*; yet he obſerves, that, in 1670, the title of honour went to the remoter heir-male; and hence he concludes, that the limitation of the peerage cannot be determined from the limitation of the eſtate in the inveſtitures approaching neareſt to the time of the creation of the peerage (*n*).

It is true, that the diſtance in point of time between May 1488 and 1511 is ſmall; but then it will be remembered, that during that interval great changes had happened in the family of Glencairn. Alexander, ſlain in 1488, was ſucceeded by his ſon Robert, and he again by his ſon Cuthbert, the grantee in the charter 1511. How the inveſtitures ſtood in the perſon of Alexander, or of his ſon Robert, is not diſcoverable from record, and the claimant has not the power of diſcovering them by a ſearch into the archives of the family of Glencairn.

The limitations in the perſon of the grandſon will not neceſſarily aſcertain the limitations in the perſon of his father, and of his grandfather.

Beſides, it is moſt preſumable, that ſoon after 1511, the inveſtitures were limited to *heirs male*: for there is extant on record, a charter in 1531, of many lands to William Maſter of Glencairn, the ſon of Cuthbert, the grantee, in 1511, et ſuis "*hæredibus maſculis*; quibus deficien. ſeniori hæredum ſuarum fœminearum abſ-

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*m*) This grant was certainly good, to create a peerage; and, from the uſages of Scotland, it might be good to eſtabliſh a precedency: but whether it could revive a grant [May 1488], null by a ſtatute, is a queſtion between law and prerogative.

(*n*) This ſeems to be the import of his argument, though obſcurely expreſſed, by reaſon of ſome error or omiſſion in printing.

"que

" que diviſione." This charter has been overlooked by Sir Robert Gordon, although he has given himſelf the trouble of quoting another charter twenty years later; it is a charter of *appriſing* of the lands of Challauchwrae, moſt naturally limited *hæredibus et aſſignatis*. Reaſon I. Preſump. 5.

The claimant's propoſition receives additional force from the limitation in the charter of the barony of *Kilmawers*, the ancient family-eſtate, in 1642. It is to William Earl of Glencairn, " *et hæredibus ſuis maſculis et* TALLIÆ *in in-* " *feofamento terrarum de* Glencairne *ſpecificat*."

It is remarkable, that the patent by Charles I. in 1637, is not to *heirs male*, nor yet to *heirs-general* ſimply, but it is to " *hæredes ſui et ſucceſſores*."

Unleſs by *ſucceſſores* be underſtood *heirs of entail*, by ſome limitation then ſubſiſting, the claimant will ſhew, from Sir Robert Gordon's own expreſs conceſſion, that, in 1670, the *heir-general*, not *the remoter heir-male*, ought to have ſucceeded to the title of honour by the patent 1637. His words are, " By the p. 2. 3. " terms *hæredes ſui*, in limitations either of lands *or peerages*, were under- " ſtood only the ancient heirs, *viz. heirs-male*. It required the introduc- " tion of the words *hæredes quoſcunque*, in the thirteenth or fourteenth cen- " tury, to make room for the admiſſion of females into *either*. But after ſuch " admiſſion, the word *quoſcunque*, which was once neceſſary, was dropped, as " no longer ſo." He adds, which is the expreſſion to which the claimant al- ludes, " *and hæredes ſui, now mean heirs of both kinds*."

If the words *hæredes ſui* do *now* mean *heirs-general*, as indeed they do, it will not be ſaid that they had another meaning in 1637. It therefore follows, that, by virtue of that expreſſion in the patent 1637, the *heir-general* ought to have taken in 1670.

As ſhe did not, it muſt be concluded, that the *remoter heir-male* took by virtue of the expreſſion *ſucceſſores*.

6. ERROL.

p. 28. " The earldom of Errol was created about the beginning of the thir- " teenth century. The earlieſt charter which Sir Robert Gordon can " find on record of any part of the eſtate of Frrol, is 31ſt January 1466-7; " and limits the eſtate, " *hæredibus inter ipſos; quibus fortè deficienti-* " *bus, veris et propinquioribus hæredibus dicti* Nicholas *quibuſcunque*. " In 1510, 1512, 1521, 1530, the inveſtitures of the family are *hæ-* " *redibus ſuis*."

ANSWER.

What pretence Sir Robert Gordon had to quote thoſe charters as relating to the *eſtate of Errol*, or as proving *the inveſtitures of the family*, is to the claimant unknown.

Not one of them has the moſt remote connection with the earldom of Errol. N° 1. is of the lands of Ergath, N° 2. of the ſheriffdom of Aberdeen, N° 3. of the *ſixth* part of the lands of Inchmartin, N° 4. of the barony of Downie, and N° 5. of the lands of Argeth.

Reaſon I. Preſump. 5. This affords a ſtriking example of the conſequences ariſing from the uſe of the ambiguous and indefinite term *eſtate*.

7. DOUGLAS.

p. 28. "Sir Robert Gordon has not been able to aſcertain the time of the "date of the creation of this ancient peerage, but the firſt charter he "has diſcovered on record of any part of the eſtate of this family is in "1370, the limitation of which is, *Willielmo Comiti de Douglas*, et "*hæredibus ſuis et aſſignatis*. In 1373, the ſame limitation continues.— "In another charter of Robert II. the limitation is, *hæredibus ſuis*. In "1426, the ancient barony of Bothwell, on which the Earls of Douglas "uſed to reſide, and a very large eſtate, is limited *Archibaldo, et Eu-* "*famiæ ſponſæ ſuæ, et eorum diutius viventi, ac hæredibus inter ipſos* "*legitimè procreatis ſeu procreandis; quibus fortè deficientibus, ve-* "*ris, legitimis, et propinquioribus hæredibus dicti Archibaldi quibuſ-* "*cunque.*"

ANSWER.

Although Sir Robert Gordon might not be able to *aſcertain* the preciſe period of the commencement of this peerage, he might have ſeen from *Rymer*, t. 6. p. 108. that *Willielmus Comes de Douglas* exiſted in 1357. He muſt have ſeen, that the charter which he quotes as in January 1370, was not of the *earldom of Douglas*, but of the *lands of Balmouth*; that the *ſecond* is of *the foreſt of Cabrach*; and the *third* of *the lands of Tillicutry*; all of them ſubjects unconnected with the earldom of Douglas, and utterly inſignificant in the preſent queſtion.

As to the *ancient barony* of Bothwell (*o*). It is *now* an *ancient barony*, in the poſſeſſion of the Douglas family; but it was not an *ancient barony* in 1426. It accrued to the Earls of Douglas, by the marriage of Archibald, the 3d Earl, with Jean, the daughter and heireſs of Thomas Murray, *Dominus de Bothwell.*

It is obvious, from a compariſon of dates, that the barony of Bothwell did not accrue to the Earls of Douglas, for *thirty* years after the creation of the peerage. William Douglas was Earl in 1357; James, 2d Earl of Douglas, was ſlain at Otterburn in 1388; he was ſucceeded by Archibald, the huſband of the heireſs of Bothwell.

No limitation therefore of the barony of Bothwell can ſerve to ſhew in what

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*o*) It is ſaid, "That the Earls of Douglas uſed to reſide in the barony of Bothwell." The late Duke *did*, about ten years ago, after his own caſtle was burnt. Dalkeith was the principal ſeat of the firſt Earl of Douglas.

manner

manner the dignified fief of Douglas ſtood limited, " *before, at, or ſoon after,* Reaſon I. Preſump. 5.
" the creation of that earldom."

The limitation in the charter 1426 of the barony of Bothwell to *heirs-general* was moſt natural and reaſonable, for that the grantee held it in right of his grandmother.

8. *CAITHNESS.*

p. 28. " The peerage of Caithneſs was renewed in the family of Sinclair be-
" tween 1452 and 1476. The only charter which approaches near to
" the period of the creation of Sinclair Earl of Caithneſs is a charter 7th
" December 1476. It grants, *omnes et ſingulas terras comitatûs Ca-*
" *thaniæ, Willielmo Sinclair, filio dicti Willielmi Comitis Cathaniæ, et*
" *hæredibus ipſius Willielmi filii quibuſcunque.*"

ANSWER.

There is no difficulty in aſcertaining with the utmoſt preciſion the date of the creation of William Sinclair, Earl of Caithneſs; for the original charter ſtill exiſts. It is dated 28th Auguſt 1455, and ſtands limited *hæredibus ſuis.* This charter 1455, and the charter 1476, would no doubt have carried the peerage to *heirs-general*; but the claimant has formerly ſhewn, that George, the grandſon of the grantee in the charter 1476, reſigned the earldom, and obtained a new grant *hæredibus maſculis*; that the peerage has been enjoyed upon this grant; and that, if it was not good to convey the peerage, all thoſe perſons who aſſumed the title of Caithneſs during a period of 200 years were uſurpers.

9. *LINDSAY of BYRES.*

p. 29. " Sir Robert has not been able to aſcertain the preciſe date of the cre-
" ation of this peerage; but the firſt charter he diſcovers to Lord Lind-
" ſay, is in the year 1495. It contains a grant of the lands and barony
" of Byres, *Johanni Domino Lindſay de Biris.* The limitation of the
" eſtate is, *hæredibus inter ipſos legitimè procreatis ſeu procreandis;*
" *quibus fortè deficien. veris, legitimis, et propinquioribus hæredibus*
" *dicti Johannis Domini Lindſay quibuſcunque.*"

ANSWER.

In his former caſe Sir Robert mentioned Lord Lindſay as appearing on the rolls of parliament 1457; and if *Dominus de Lindſay* meant *Lord Lindſay*, the family was ennobled before 1398. *Rymer*, t. 8. p. 35.

Even according to Sir Robert's laſt account of the matter, the Lord Lindeſay

Reaſon I. Preſump. 5. ſay who obtained the charter 1495 was the *third* peer of the family; and from the limitation in his charter, a preſumption is raiſed as to the limitations in former charters; while at the ſame time Sir Robert has omitted mention of the royal charter obtained in the lifetime of Patrick, the immediate ſucceſſor of this John, limiting the *dominium et baronia de Byres* to John Lindſay, his eldeſt ſon and heir-apparent, and his *heirs-male* (*p*).

10. *SEMPILL.*

p. 29. "This peerage was created ſome time between 1474 and 1505. In "a charter 1474, the eſtate of Elliotſtoun and Glasford is limited *filio* "*Roberti Sempill, Militis, et hæredibus ſuis.* In a charter 1505, the "ſame eſtates are limited, Johanni *Domino* Sempill, et *hæredibus ſuis.*"

ANSWER.

1. The two charters relate not to the dignified fief, and conſequently are not to the purpoſe.

2. Good evidence was formerly ſtated, for proving that an heir-female inherited both the eſtate and the dignity.

11. *BORTHWICK.*

p. 29. "This peerage was created ſome time betwixt 1410 and 1458. The "limitations in the inveſtitures immediately prior to the creation are, "*hæredibus ſuis*; in 1483, *hæredibus et aſſignatis.*"

ANSWER.

One of the charters is of the lands of Glengelt, the other of the lands of Little-Lochquharret. Neither the one nor the other has any relation to the dignified fief. The firſt erection of the *barony of* Borthwick in 1538, is limited by a royal charter to *heirs-male*; and this again is renewed by another royal charter in 1543.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*p*) Royal Charter, penult May 1524. Records, b. 45. N° 364.

12. *FRA-*

12. *FRASER of LOVAT.*

p. 29. "This family were made peers ſome time betwixt 1430 and 1480. Evidence, Retour 1430, in which *Hugh Fraſer de Lovat* is retoured by that deſignation. Royal Charter 1480, in which Hugh is deſigned *Hugo Dominus Fraſer de Lovat*. Eleven charters between 1432 and 1536, are produced, for proving, that during that period the limitations of the inveſtitures were *hæredibus ſuis*, and *hæredibus quibuſcunque*." Reaſon I. Preſump. 5.

ANSWER.

It is ſingular, that although Sir Robert Gordon has ranſacked the records for examples, and has even ſwelled their number, by making reference to *appriſings*; yet that he has not produced one ſingle charter relative to the dignified fief of Lovat.

He ſtops ſhort juſt at the period when a royal charter of the whole family-eſtate appears upon record. The claimant will ſupply this defect in his narrative.

In 1539, Hugh Lord Fraſer of Lovat reſigned his whole family-eſtate into the hands of the King, and obtained a new charter, uniting, creating, and incorporating, "in unam integram et liberam baroniam, omni tempore affuturo, Baroniam "de Lovat nuncupand." limited "dicto Hugoni Domino Fraſer, et *hæredibus ſuis* "*maſculis* de corpore ſuo legitimè procreat. ſeu procreand.; quibus deficienti- "bus, legitimis et propinquioribus *hæredibus ſuis maſculis* quibuſcunque, arma, "inſignia que, et cognomen de Fraſer, portantibus et gerentibus; quibus de- "ficien. hæredibus ſuis quibuſcunque, de nobis, &c. in feodo et hæreditate, "ac *libera baronia*."

This is the charter upon which the court of ſeſſion, rightly, although incompetently, adjudged the honours of Lovat to Simon Fraſer.

13. *HALIBURTON.*

p. 29. "The firſt charter on record to a Lord Haliburton is in 1451. The "limitations in the inveſtitures of the family-eſtate were *hæredibus ſuis* "at that time."

ANSWER.

The fact is admitted; and it has been proved on the part of the claimant, that the heir-female did ſucceed to the family-eſtate, and to the dignity; and that both devolved on the crown by the forfeiture of her grandſon in 1600.

14. *HERREIS.*

Reaſon I. Preſump. 5. p. 29. "The peerage of Herreis was created ſome time between 1486 and "1493. The limitation of the eſtate, in a charter 1486, is *hæredibus ſuis*, in 1493 *hæredibus de corpore*; whom failing, hæredibus "quibuſcunque."

ANSWER.

It has been already proved, that as the inveſtiture of the dignified fief ſtood *hæredibus ſuis*, the daughter of William Lord Herreis ſucceeded to the honours and eſtate, in preference to the heir-male.

SIXTH PRESUMPTION.

p. 18. "Another preſumption ariſes from the ſentiments of peers who were "in a ſimilar ſituation. There are a variety of inſtances of peers reſign- "ing peerages *whoſe limitations were unknown*, and taking new crea- "tions, limiting the honour to heirs-female on failure of males; which "prove their ſenſe, that a *definite and expreſs* limitation was neceſſary "for letting in females, who were otherwiſe excluded under an unknown "and indefinite one." It it added in a note, "A great number of them "were pointed out in the printed caſes concerning the earldom of Stair "in 1748."

ANSWER.

The claimant cannot admit this preſumption. It would infer, that the peers of Scotland always employed men of buſineſs, converſant in law, and in the hiſtory of their country, not actuated by ſelf-conceit and caprice, nor ſubject to timorouſneſs and over-caution, nor willing to multiply parchments and writings without cauſe.

But indeed there is nothing in the preſumption; and had Sir Robert Gordon, inſtead of referring to the caſes of Stair, been pleaſed to print the examples themſelves, it would have been perceived at once, that there was nothing in the preſumption.

Among thoſe examples, there does not occur any one of a peer reſigning a peerage *whereof the limitations were unknown*.

All the examples relate to peerages created by patent ſince 1600, and afterwards reſigned for the purpoſe of letting in heirs of entail and proviſion, ſucceeding to the eſtate of the reſigner.

Reaſon I. Preſump. 6. p. 33.

As to what Sir Robert obſerves, in another paſſage of his Supplemental Caſe, that the new creation of Napier "expreſsly bears, that it was granted to *heirs-* "*general*, becauſe, without the reſignation, it muſt have gone to *heirs-male*," the anſwer is to be found in the original patent itſelf. It is to Archibald Lord Napier, and was limited to him, and *the heirs-male of his body*. In 1677, his grandſon followed the cuſtom then prevalent: he reſigned his dignity, and obtained a new charter, tranſmitting it in the ſame channel as his eſtate, firſt to the heirs-male of his body, then to the eldeſt heir-female of his body, and laſt of all to his heirs of entail and proviſion.

SEVENTH PRESUMPTION.

The claimant will now examine a capital preſumption argued upon by Sir Robert Gordon, with an exultation equally confident and aſtoniſhing.

R. 4. P. 20. "There is," ſays he, "DIRECT PROOF, that in the firſt inſtance where "the ſucceſſion opened to an heir-female, the peerage went to the heir-"male, in excluſion of the heir-female. For this Earl John had two "ſons, *Alexander* and John: Alexander died before his father, *leaving a* "*daughter, Marjory, married to the Earl of Caithneſs*. In order to "prevent any claim, however weak, of hers, by means of her huſband's "powerful family, to his eſtate, he made a reſignation, in 1455, in fa-"vour of his ſecond ſon John. In 1460, *this ſecond ſon, the heir-male,* "*ſucceeded to the peerage, in prejudice of Marjory, the heir-female.*"

In ſupport of this propoſition Sir Robert quotes many authorities.

ANSWER.

The claimant admits, that a Marjory Sutherland married the Earl of Caithneſs, and had iſſue. She knows that at this day there are thouſands of perſons in Scotland deſcended of that lady.

But "that Earl John had an eldeſt ſon, Alexander, who died before him," is a propoſition *without evidence*. "That Marjory Sutherland Counteſs of Caith-"neſs *was* the daughter of *this* Alexander," is a propoſition *contrary to demonſtrative evidence*.

By what means it happened that this error concerning a Marjory, the daughter of the *ſuppoſed* Alexander, has crept into genealogical hiſtories, the claimant knows not, nor is ſhe bound to inquire.

But that it *is* an error, ſhe will, by production of an authentic inſtrument, prove to the conviction of every impartial perſon. She wiſhes to add, to the conviction of the managers for Sir Robert Gordon, and Mr Sutherland of Forſe; but ſhe much fears that *they* are *already* convinced (*p*).

PROOFS, AUTOHRITIES, and ILLUSTRATIONS.

(*p*) Before the publication of the Supplemental Caſes, (if ſhe is not miſinformed), an agent of Sir Robert Gordon *ſaw a copy* of this inſtrument; and an agent of Mr Sutherland of Forſe *was actually poſſeſſed of the original.*

For

Reaſon I. Preſump. 7. For explaining *who* this Marjory Counteſs of Caithneſs was, there is produced an original precept by "Alexander de Ile, Comes Roſſiæ, ac Dominus Inſularum, dat. ſub ſigillo noſtro, apud Inverneſs, 24° die menſis Octobris, anno Domini 1429."

It grants "Alexandro de Sutherland, et Mariotæ de Ile, ſorori noſtræ, ſponſæ ſuæ, et eorum diutius viventi, et eorum hæredibus inter ſe de corporibus ſuis procreatis ſeu procreandis, omnes et ſingulas *terras noſtras* dominii de *Dunbeath*, cum caſtro ejuſdem, &c. jacen. in comitatu Cathaniæ."

This is evidently an original grant, not proceeding on a reſignation or other antecedent title.

Who was the father of this Alexander Sutherland of *Dunbeath*, has not hitherto been diſcovered. That John Earl of Sutherland was *not* his father, is evident from the deed now to be ſtated.

It is an original latter-will and ſettlement by Alexander Sutherland of Dunbeath; to this is prefixed an inventory of all his goods, made, at Roſlin, 14th November 1456.

The inventory contains, among other articles, the following. "*Item*, The Earl of Southerland *tuk* of my gold, ſylver, jeoullis, *clethyng*, *fermys*, mat, [malt], yrn, and uther gudis, *mar than a thuſand pundis*, *quhat firſt what laſt*, atour his *lettres of ſeil and bodylik aythis*, before notable witneſs, the quilks I have to ſhaw for me."

The ſettlement contains the following bequeathment. "I give and I leve *to my Lord Erle of Caithneſs and Orkney, and Marjory my daughter, and to the bairnes gottin and to be gottin betwixt thaim*, the thouſand lib. that the Erle of Southerland has of myn, and is awand me, or *quhat* may be recovered tharof. *Item*, I give and laif to the bairns gottin and to be gottin betwixt my ſaid Lord Erle of Caithneſs and Orkney, and *Marjory my daughter*, all the lands that I have in wedſetting of the ſaid Lord Erle within the earldom of Caithneſs," *&c.*

By the ſame deed Alexander Sutherland of *Dunbeath* bequeathes legacies to the perſons following. To "my ſon Mr Alexander of Southirlande, erſden [*i. e.* archdean] of Caithneſs;—my ſon Robert;—my ſon Nicholace;—my ſon Edward;—my daughter Marion;—my daughter Elynor;—my daughter Katheryn;—my daughter Janet."

He alſo names as one of the executors of his will, "Alexander of Straitoun, laird of Louriſton, *my ſiſtar ſon*."

He, moreover, mentions, "my lands of Dunbeath;" and makes a bequeathment to "my Lord Erle of Roſs, he being gud Lord manteynar, ſupplear, and defender, to my barnes," *&c.*

This deed is ſealed by the granter, and is authenticated by two notaries-public.

The original is in the poſſeſſion of Mr Sinclair of Roſlin, a gentleman lineally deſcended from William Earl of Caithneſs and Counteſs Marjory Sutherland. It is verbatim ingroſſed in Mr Richard Hay's MS *Memoirs*, Advocates Library, Edinburgh.

After ſo full a recital of this deed, it would be indecent to uſe many words for proving, that Alexander Sutherland of Dunbeath, father of Marjory Counteſs of Caithneſs, was *not* the ſon of John Earl of Sutherland, *nor* the elder brother

ther of John alſo Earl of Sutherland; and conſequently that *Marjory Counteſs of Caithneſs, grand-daughter and heir of line of John Earl of Sutherland, is altogether a fabulous perſonage.* Reaſon I. Preſump. 7.

From the deed itſelf, the following circumſtances appear.

1. That Alexander Sutherland of [Dunbeath the *ſuppoſed* Maſter of Sutherland] was a perſon who thought himſelf oppreſſed by the Earl of Sutherland, his *ſuppoſed* father. The Earl of Sutherland had taken from him even his cloaths, and the grain, the produce of his lands, [*clethyng, fermys*]; the injury had been repeated, [*quhat firſt quhat laſt*]; the extent of the injury had never been liquidated, [*mar than a thuſand pundis*]; obligations and ſolemn promiſes to indemnify him had been given, but never made effectual, [*lettres of ſeil, and bodylik aythis*].

The deed is dated at Roſlin in Mid-Lothian, the caſtle of his ſon-in-law the Earl of Caithneſs.

He recommends his children to the protection of his ſuperior, Alexander Earl of Roſs, the grand-nephew of *Mariota de Yle.*

All this ſpeaks the condition and the language of a *little* man, oppreſſed by a *potent* neighbour.

2. Beſides his daughter Marjory, wife of the Earl of Caithneſs and Orkney, and four daughters more, he mentions no fewer than *four* ſons, Alexander, Robert, Nicholas, and Edward. Had *he* been *Maſter of Sutherland*, how could Counteſs Marjory be his heir at law, in prejudice of his *four* ſons, *all* alive in 1456?

3. This deed is dated 14th November 1456; how then could John, his *ſuppoſed* younger brother, be *heir-apparent* of the Earl of Sutherland in the February preceding, 1455-6.

The claimant, Lady Eliſabeth, will draw no other concluſion from the hiſtory of this PHANTOM, "Marjory Counteſs of Caithneſs, the daughter of Alexander, "heir-apparent of Sutherland," but this, That they who come to plead before the Higheſt and Moſt Honourable Tribunal in Europe, ought not to be as careleſs, and as inattentive to evidence, as if they were pleading before a *court of Piepowders.*

EIGHTH PRESUMPTION.

p. 21. "If the inveſtitures of the family-eſtate can afford a preſumption, they "ſtand againſt Lady Eliſabeth's claim. For during the firſt period of the "peerage, viz. from its origin until its new root in Adam Gordon, "they are all to heirs-male. During the ſecond period, viz. that which "ſucceeded the creation of Adam Gordon, down to 1706, the ſame li-"mitations in the inveſtitures continue: for in 1559, the grant of the "ſheriffſhip of Inverneſs is to heirs male expreſsly; and the regality "granted by King David II. ſunk only becauſe it could not, under a li-"mitation *hæredibus inter ipſos*, go to heirs-female. In 1601, John "Earl of Sutherland, probably with a view of obviating any poſſible diſ-"pute from the alteration made in the limitations of his eſtate by the "charters 1546, and 1580, reſigned it into the King's hands, and got a

Reaſon I. Preſump. 8.

" new grant to heirs-male, under the definite term *hæredes maſculi*. " In this inveſtiture heirs-female are not even called in the laſt termina- " tion, though it is proved the grantee had daughters living at the time. " The charters 1631 and 1662 are likewiſe to heirs-male; and by that " in 1681, Earl George ſettles his eſtate upon the heirs-male of his own " body, failing thoſe of his eldeſt ſon, to the prejudice of his ſon's " daughters. But the contract 1705, and charter 1706, ſhew more " clearly than any of the foregoing, that the Earls of Sutherland knew " their peerage had been originally granted, and muſt deſcend, to heirs- " male; ſeeing John Earl of Sutherland attempted, though without ſuc- " ceſs, to reſign it, in order to let in heirs-female: and it appears, from " the laſt Earl of Sutherland's marriage-contract in 1761, that he enter- " tained the ſame ſentiments as the former Earls upon this point; for, " failing iſſue of his own body, he ſettles his eſtate upon his heirs ſuc- " ceeding him in the title and dignity of Earl of Sutherland; thereby ex- " preſſing a ſtrong doubt of his female heir at law's being that perſon."

ANSWER.

According to the method already uſed, the different clauſes of this eighth preſumption ſhall be ſeparately conſidered.

1. " During the firſt period of the peerage, viz. from its origin until its new " root in Adam Gordon, all the inveſtitures of the family-eſtate are to *heirs-* " *male*."

It has been proved over and over again, that all the ancient inveſtitures of the family ſtood *hæredibus ſuis*, or *hæredibus inter ipſos*; and that thoſe limitations did anciently, as they do now, imply *heirs general*.

While the inveſtitures ſtood *hæredibus ſuis*, Eliſabeth was ſerved and retoured neareſt lawful heir to her brother John. At that time Richard Sutherland of Forſe, or his ſon John, certainly exiſted, and was as certainly the heir-male of Earl John.

Upon what authority then does Sir Robert Gordon perſiſt in averring, that the ancient inveſtitures of the family were to *heirs-male*?

2. " During the ſecond period, viz. that which ſucceeded the creation of " Adam Gordon, down to 1706, the ſame limitation in the inveſtitures conti- " nue; for in 1559, the grant of the ſheriffſhip of Inverneſs is to heirs male ex- " preſsly." This is more fully ſet forth, p. 13. in the following words. " By a " precept and ſeiſin in 1559 it appears, that George Lord Gordon, the Earl of " Huntly's ſon, had granted a charter, conſtituting John Earl of Sutherland, " and his heirs male, ſheriffs-depute of the county of Inverneſs, over the bounds " of the earldom of Sutherland; which charter not only proves the general li- " mitation to heirs-male, but alſo, that the regality, which had been given to " Earl William in the year 1347, had not deſcended to Eliſabeth, becauſe ſhe " was a female; for if that regality granted to Earl William, *et hæredibus inter* " *ipſos*, had paſſed through a female, the ſheriffſhip within the bounds of the " earldom

" earldom could not have taken place, a ſheriffſhip and regality in the ſame " bounds being utterly incompatible (*q*)." Reaſon I. Preſump. 8.

A limitation in a grant made by the Earl of Huntly's ſon, can never infer any preſumption as to the limitations of the family-eſtate of Sutherland; and *this* the more eſpecially, becauſe in the next paragraph Sir Robert Gordon admits, that in 1559 the inveſtitures of the eſtate of Sutherland ſtood limited by a charter in 1546, " *hæredibus inter ipſos; quibus deficien. legitimis et propinquioribus hæ-* " *redibus quibuſcunque ſeu aſſignatis.*"

Here then Sir Robert pleads for the general limitation to heirs-male, contrary to that very evidence which he himſelf produces: the contradiction is direct and palpable.

There is nothing in the grant 1559 for proving, that the regality in the grant 1347, had not deſcended to Eliſabeth. The grant 1559 is of a ſheriffdom *infra*

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*q*) Sir Robert's criticiſm, founded on the inaccuracy of the writer of the charter 1583, reſpecting the barony of Farr, and the mention of the word *maſculi* in the *Reddendo*, is rather trivial. That charter proceeds on George Earl of Huntly's reſignation in favour of Alexander Earl of Sutherland, " *hæredibus ſuis* et aſſignatis." Original Inſtrument, 29th May 1583, in the claimant's poſſeſſion. Beſides, the inaccuracy, if material, was ſoon corrected by Alexander Earl of Sutherland, the grantee in the charter; for he reſigned the lands, and obtained a new charter thereof in 1588, in favour of his ſon and heir, " *ſu-* " *iſque hæredibus* et aſſignatis hæreditariè *quibuſcunque.*"

Were charters of detached parcels of land to be of any weight in the determination of the preſent controverſy, the following royal charters might be ſtated.

1. Royal charter of the lands of Cracock, Eſtirloch, &c. " Joanni Comiti de Suther- " land, et Margaretæ Comitiſſæ de Sutherland, ſponſæ ſuæ, et eorum alteri diutius vi- " venti, et hæredibus inter ipſos legitimè procreatis ſeu procreandis; quibus fortè deficien. " veris legitimis et propinquioribus *hæredibus* dicti Joannis *quibuſcunque*," 29th April 1451.

2. Royal charter of the lands of Nevyndale, Eaſter Garthe, Weſter Garthe, &c. " A- " lexandro Gordoun, Magiſtro de Sutherland, filio et apparenti hæredi conſanguinei no- " ſtri Adæ Comitis de Sutherland, et Janetæ Stewart, ejus ſponſæ, et eorum alteri diuti- " us viventi, in conjuncta infeodatione, et *hæredibus inter ipſos* procreatis ſeu procreandis; " quibus deficien. legitimis et propinquioribus *hæredibus* dicti Alexandri *quibuſcunque*," 4th March 1527.

Thoſe two charters are ſtated in Sir Robert Gordon's Firſt Caſe, and contradict his averment, That the charter 1546 is the firſt alteration of the ancient inveſtitures, by introducing *hæredibus quibuſcunque*.

3. Royal charter, confirming a charter by the Biſhop of Caithneſs, of the lands of Gauldwell, and ſundry other lands, " Alexandro Sutherlandiæ Comiti, et hæredibus ſuis " maſculis de corpore ſuo legitimè procreatis ſeu procreandis; quibus deficientibus, *ſeniori* " *hæredum fœminearum ipſius Comitis de corpore ſuo legitimè procreatis ſeu procreandis, abſ-* " *que diviſione*; quibus deficientibus, legitimis et propinquioribus hæredibus et aſſignatis " dicti Comitis quibuſcunque," 23d November 1581.

4. Royal charter of the lands and barony of Farr, &c. " Alexandro Sutherlandiæ " Comiti, *ſuis hæredibus* et aſſignatis," 5th July 1583.

5. Royal charter of the lands of Stroakel, &c. " Alexandro Sutherlandiæ Comiti, *hæredibus ſuis* et aſſignatis quibuſcunque," 3d March 1584.

6. Royal charter of the lands and barony of Farr, &c. " Joanni Gordoun, filio natu " maximo et hæredi apparenti chariſſimi noſtri conſanguinei Alexandri Sutherlandiæ Co- " mitis, *ſuiſque hæredibus* et aſſignatis hæreditariè *quibuſcunque*," 21ſt May 1588.

ſingulas-

Reaſon I. Preſump. 8. *ſingulas bondas comitatûs Sutherlandiæ*; a very different thing from a ſheriffdom *over the bounds of the earldom of Sutherland*, as the words are tranſlated by Sir Robert.

The probability is, that the grant 1559 was made in order to prevent all colliſion of juriſdiction, ariſing from the boundaries of the regality and of the ſheriffdom not being exactly known or aſcertained by uſage.

If the regality did not deſcend to Eliſabeth, the heir-general of Earl William, it muſt have deſcended to his heir-male, who, in 1559, was Richard Sutherland of Forſe.

Beſides, when James VI. of new erected the earldom of Sutherland into a regality, *anno* 1601, he referred to the former grant made by David II. in favour of Earl William.

And, which is concluſive againſt Sir Robert's argument of incompatibility, that ſame inſtrument 1601, which grants the regality, expreſsly grants a right of ſheriffdom *infra bondas reſpectivè prædict.*

3. "In 1601, John Earl of Sutherland, probably with a view of obviating "any poſſible diſpute from the alteration made in the limitations of his eſtate "by the charters 1546 and 1580, reſigned it into the King's hands, and got a "new grant to heirs-male, under the definite term *hæredes maſculi*. In this in- "veſtiture, heirs-female are not even called in the laſt termination, though it is "proved the grantee had daughters living at the time."

It has been already proved, that the charters 1546 and 1580 made no change in the ancient inveſtitures: the ancient inveſtitures briefly expreſſed thoſe limitations which the charters 1546 and 1580 expreſſed more at large.

What is meant by *obviating any poſſible diſpute?* There could be none as to the import of the limitations 1546 and 1580.

The charter 1601, by which Sir Robert ſays, that *every thing was ſet to rights*, is of a ſingular nature. Failing Earl John, and his two brothers, and the heirs-male of their bodies, the eſtate is limited to Adam Gordon, and his heirs-male whatſoever; in other words, if Earl John, and his two brothers, both very young men, died without iſſue-male, the eſtate of Sutherland was to ſink for ever in the family of Huntly.

This ſettlement was in every view irrational. By it the heirs-general of the family, Gordon of Garty, the heir-male of Adam Gordon and Counteſs Eliſabeth failing Earl John and his brothers, and alſo Sutherland of Forſe, the heir-male of the ancient Earls of Sutherland, were all excluded.

At that time the Earls of Huntly and Sutherland were zealous Roman Catholics. The great object of the ſettlement 1601 muſt have been to ſupport the intereſt of that party. This, together with the ſtrange partiality for the ſucceſſion of males which prevailed in Scotland during great part of the 17th century, will ſerve to account for the great deviation from the ancient form of the inveſtitures of the family of Sutherland.

In 1681, the charm of ſuperſtition was diſſolved, and the inveſtitures were again turned into their ancient channel.

4. The

4. " The contract 1705, and charter 1706, ſhew more clearly than any of the " foregoing, that the Earls of Sutherland knew their peerage had been origi- " nally granted, and muſt deſcend, to heirs-male; ſeeing John Earl of Suther- " land attempted, though without ſucceſs, to reſign it in order to let in heirs- " female." At p. 15. it is ſaid, that " Queen Anne, from a principle of juſtice " and ſound policy, refuſed to ſign the charter." Reaſon I. Preſump. 8.

It is hard to ſay, why *this principle of juſtice and ſound policy* ſhould have affected Queen Anne and her miniſters, in the particular caſe of Sutherland, at a period when ſuch reſignations for letting in heirs of proviſion were uſual.

Sir Robert Gordon has no other reaſon for averring, that Queen Anne refuſed to ſign the charter, but this, that it was not ſigned.

Greater favours would not at that critical period have been denied to the Earl of Sutherland.

Family-reaſons may have induced him to vary the natural order of ſucceſſion, and other family-reaſons may have moved him to depart from that plan.

Nevertheleſs it ought to be acknowledged, that the evidence of John Earl of Sutherland's being conſcious that the peerage muſt have deſcended to heirs-male, is rather ſingular, when, according to the plan of the charter 1706, it was propoſed to prefer the ſecond ſon to the daughter of the eldeſt ſon!

That propoſed limitation might be urged as a more convincing evidence of the direct contrary propoſition, thus: John Earl of Sutherland knew, that the peerage muſt have deſcended to *heirs-general*; and therefore he propoſed, by means of a reſignation, to let in *heirs-male*.——But the moſt ſingular argument yet remains.

5. It is ſaid, " That it appears from the laſt Earl of Sutherland's marriage- " contract in 1761, that he entertained the ſame ſentiments as the former Earls " upon this point. For, failing iſſue of his own body, he ſettles his eſtate up- " on his heirs ſucceeding him in the title and dignity of *Earl of Sutherland*; " thereby expreſſing a ſtrong doubt of his female heir at law being that " perſon."

Were it of conſequence, the claimant could prove, that as her grandfather had wakened the action of precedency in 1746, ſo her father wiſhed to have that queſtion tried. *This* of itſelf ſhews, that he entertained no ſuch ſentiments as thoſe which Sir Robert Gordon is pleaſed to aſcribe to him.

Beſides, the limitations in the marriage-contract 1761 are too much abridged in the Supplemental Caſe. They run thus: " To the ſaid William Earl of Su- " therland himſelf, and the heirs-male to be procreated of this marriage, and " the heirs whatſoever of their bodies; whom failing, to the heirs-male to be " procreated of his body of any other marriage, and the heirs whatſoever of " their bodies; whom failing, to the daughters of this marriage, and the heirs " whatſoever of their bodies; whom failing, to the Earl's other heirs ſucceed- " ing to him in the dignity of the Earl of Sutherland; the eldeſt daughter, or " heir-female, through the whole courſe of ſucceſſion, always ſucceeding with- " out diviſion, and excluding all other heirs-portioners."

Are there any words in this deed which ſeem to imply, that the Earl of Sutherland had a doubt, that the daughter of his ſon, or his own daughter, *i. e.* his heir-female, would ſucceed to the peerage of Sutherland?

Reaſon I. Preſump. 8. The expreſſion, his *other heirs*, ſubjoined to that of *the heirs-general* of his own body, ſhews the direct contrary; as does the proviſion in favour of the eldeſt female, through the *whole courſe of ſucceſſion*.

NINTH PRESUMPTION.

The claimant has at laſt arrived at the *ninth*, and what may be termed *the Giant preſumption*, in Sir Robert Gordon's Supplemental Caſe.

It reſpects the methods by which Adam Gordon is ſuppoſed to have acquired the eſtate and dignity of Sutherland.

This preſumption, briefly reſumed at p. 21. 22. is enforced with a profuſion of hiſtorical criticiſm, from p. 5. to p. 9.

New diſcoveries in hiſtory, like new diſcoveries of unknown countries, are ſcanty and imperfect, eſpecially where hypotheſis is the guide.

The claimant, tracing Sir Robert's courſe, will endeavour to ſupply what may be wanting, and to rectify what may appear erroneous, in his hiſtorical delineation of the ſtate of Sutherland about the commencement of the ſixteenth century.

The very words of Sir Robert Gordon ſhall be ſtated. The remarks on them will ſometimes be unavoidably prolix: it is hoped, however, that this will be excuſed, by reaſon of the great curioſity of the matter.

HISTORICAL DELINEATION.

p. 5. "John Earl of Sutherland, who ſucceeded in excluſion of Marjory "the heir-female, died ſome years before 1514. A few years after his "death, a material alteration happened in the line of the Sutherland "peerage, which deſerves great attention in the preſent diſpute."

REMARK.

This Earl John *did not ſucceed in excluſion of* Marjory, *the heir-female*. It is demonſtratively certain, and has been demonſtrated, *Anſwer to Reaſon* 1. *Preſumption* 7. that *a Marjory*, the daughter of an elder brother of this Earl John, never exiſted, unleſs in the imagination of genealogiſts. She may perhaps have had a tranſitory exiſtence in the prejudices of ſome other perſons who graſp eagerly at ſhadows.

HISTORICAL DELINEATION.

p. 5. "This Earl John left behind him two ſons, John and Alexander, and "a daughter, Eliſabeth, who was married to Adam Gordon, ſecond ſon "to the Earl of Huntly. John, the eldeſt, was a weak man; Alexander, "the ſecond, was a minor."

RE-

REMARK.

Alexander has always been eſteemed a baſtard. Sir Robert Gordon's prede- Reaſon I.
ceſſor, the hiſtorian of the family, expreſsly aſſerts, that Alexander was a baſtard. Preſump. 9.
He mentions the name of his mother, and the name of his baſtard-brother of *full blood*. Why the other baſtard-brother has been omitted in this genealogy, the claimant knows not. Sir Robert Gordon, now for the firſt time, introduces Alexander into the ſcene, and labours to eſtabliſh his legitimacy, for "*the inac-* p. 1.
"*curacies in his original caſe and appendix, which were printed before the* "*proofs arrived from Scotland, are now corrected.*" Concerning this ſupplemental legitimacy of Alexander, there will be occaſion to treat hereafter at large.

HISTORICAL DELINEATION.

p. 5. 6. "Adam, the huſband of Eliſabeth, was a man of great ambition, and "had high pretenſions, his mother being daughter to King James I. and "widow of the great Earl of Angus, head of the Douglaſſes. His fa-"ther was Lord Chancellor; his ſiſter married to Perkin Warbeck, "who, though *afterwards* found an impoſtor, was yet, by one half of "Europe, long believed to be Duke of York, and rightful heir of the "crown of England. His eldeſt brother was Lord Lieutenant of the "North, one of the governors to the young King, the moſt potent of "the highland chieftains, and, without doubt, one of the greateſt ſub-"jects in the kingdom."

REMARK.

Whether Adam Gordon was *a man of great ambition*, or not, is a circumſtance which muſt remain undecided. At Flouden field he diſplayed that perſonal valour hereditary in the houſe of Gordon. The reſt of his character is unknown; for his name never occurs in hiſtory, except on the fatal 13th September 1513.

It will be obſerved from the context, that the date of the *high pretenſions* of Adam Gordon is 1509. *They* ſhall be ſeparately and fairly examined.

That his mother was daughter of James I. is true; and this great truth is the more valuable, becauſe moſt of his other *high pretenſions* were ideal in 1509.

His mother's firſt huſband, James 3d Earl of Angus, was not *the head of the Douglaſſes*. He died childleſs, and was ſucceeded by his uncle George. This George ſuppreſſed the rebellion of the Earl of Douglas in 1455, and obtained a grant of the Douglas eſtate in 1457. Hence it appears, that the only connection of this lady with the Douglas family was, that her huſband's uncle did, in all probability,

Reaſon I. Preſump. 9. probability, ſtand bound to make her jointure good : A *high pretenſion* indeed for all the favour which the head of the Douglaſſes could beſtow !

His father was Lord Chancellor in 1498; but was removed from his office in 1502, *ſeven* years before 1509. *Crawfurd*, Officers of State, p. 57.

His ſiſter, whom the generous Engliſh affectionately denominated the *White Roſe*, was, for reaſons of ſtate, ſacrificed in marriage to Perkin Warbeck. Warbeck was executed in November 1499, *Bacon*, Life of Henry VII. *ten* years before 1509.

His brother was Lord Lieutenant of the North, and *one* of the *ſeven* governors of the young king in 1517, *Buchanan*, lib. 14. p. 259. *eight* years after 1509.

Thus, independent of the royal alliance, no great matter in thoſe days, the *high pretenſions* of Adam Gordon in 1509 ſtood thus.

The family of Angus was probably burdened with the payment of his mother's jointure.

His father had been removed from the office of Chancellor *ſeven years before*.

His ſiſter had married Warbeck, who was executed as an impoſtor *ten years before*.

Eight years after, his eldeſt brother, a man of great authority and influence, *was to be appointed* to certain offices of truſt.

Armed with thoſe *pretenſions*, Adam Gordon trampled under foot every law, human and divine, and by fraud and violence acquired the eſtate and honours of Sutherland, to himſelf, and his *iſſue-male*. Such is the general view of the hypotheſis adopted by his iſſue-male.

HISTORICAL DELINEATION.

p. 6. " It was uſual in former days, for the crown to transfer peerages from " one family to another, upon the reſignation of the peer, or indeed " upon his conſent ſufficiently manifeſted to the King; *Patent* to " Campbell of Glenorchy of the peerage of Caithneſs, 1677; *Patent* " to Robert Lord Maxwell of the peerage of Nithſdale, 1620. A va- " riety of inſtances whereof appeared in the competition for the peerage " of Stair, determined in 1748.

" The ſtate of the Sutherland family, together with this practice, ſug- " geſted to Adam Gordon views of avarice and ambition. To wait the " death of his wife's two brothers, was tedious; and even though they " died, he could not get the peerage to his children through his wife, " having the inſtance juſt before his eyes, of his wife's father ſucceed- " ing in prejudice of his elder brother's daughter, as the peerage of " Sutherland went not to females. He therefore formed a reſolution of " effectuating his views by the act of his wife's brothers; and the ſteps he " took were as follow."

R E-

REMARK.

The precedent of the excluſion of Marjory could have no influence upon Adam Gordon; for he certainly knew, as well as Sir Robert *now* does, that Marjory never exiſted. Reaſon I. Preſump. 9.

Neither could it favour his views of ambition, "that it was uſual in former "days for the crown to transfer peerages from one family to another upon the "reſignation of the peer;" for this ſimple reaſon, That the reſignation of peerages was not known, nor could be known, in the reign of James IV.; neither indeed is there a ſingle inſtance upon record of any ſuch reſignation for a century after.

By *peerage*, is here meant a peerage in Sir Robert Gordon's ſenſe of the word; that is, "a title of honour, independent of the dignified fief."

Here therefore Sir Robert Gordon is exceedingly unfortunate in the motives of ambition and avarice which he is pleaſed to aſcribe to his predeceſſor.

Sir Robert proceeds to illuſtrate his miſtake, by referring in general to the caſes in the queſtion concerning the peerage of Stair 1748; and, in particular, to the patent of Nithſdale 1620, and of Caithneſs 1677.

All the examples produced in the caſes 1748 are of peerages created by patent ſince 1600, and afterwards reſigned for the purpoſe of letting in heirs of entail and proviſion ſucceeding to the land-eſtate of the reſigner.

The caſe of Nithſdale is utterly miſunderſtood: the patent itſelf ſerves to explain it.

In 1581, on the forfeiture of Regent Morton, John Lord Maxwell obtained a grant of the earldom of Morton. On the reverſal of the Regent's forfeiture in 1585, Lord Maxwell was obliged to yield up the eſtate and dignity of Morton; and Archibald Earl of Angus, and Sir William Douglas of Lochleven, both of them heirs of entail of Regent Morton, ſucceſſively enjoyed the title. By way of compenſation to Lord Maxwell, the ſon of him who bore the title of *Morton*, James VI. created him Earl of Nithſdale, with precedency from the date of his father's creation.

Here there was no conſent required, unleſs that of a Lord Baron's agreeing to become an *Earl*. The patent of Nithſdale itſelf makes it evident that Robert never was Earl of Morton, for that he is therein ſtyled *Lord Maxwell*, and no more.

Such being the circumſtances of the caſe, it is a ſingular idea of Sir Robert Gordon's, that "upon the reſtoration of Douglas Earl of Morton, it was "thought improper that both Maxwell and Douglas ſhould hold the ſame peer-"age; and therefore, to content the former, James VI. created him Earl of "Nithſdale." All this ſeems by Sir Robert's account to have happened at *one* period, and yet there was an interval of *thirty-five years*; and in that interval there were *two Lords Maxwell*, who did not bear the title of *Morton*.

The caſe of the patent of Caithneſs 1677 is equally foreign to the matter in iſſue, not only becauſe it is a recent caſe, but becauſe the patent to Glenorchy bears the reaſon of its being granted; namely, that the Earl of Caithneſs had made over his whole eſtates to him. Beſides, all the world knows, that the

Reaſon I. Preſump. 9. patent did not long ſubſiſt. The heir of the Earl of Caithneſs claimed the dignity; his claim was allowed, and Glenorchy was created Earl of Breadalbane.

HISTORICAL DELINEATION.

p. 6. "In the year 1509, he took out brieves for ſerving his wife's brother "Earl John, heir to his father; which ſervice was to proceed before the "Earl of Huntly, Adam's own brother, as ſheriff of the county. Alex- "ander the brother had at this time prepared to oppoſe the ſervice, pro- "bably on account that John being a weak man, Alexander thought he "might repreſent him as an idiot, and thereby object to his capacity of "being ſerved; but as Alexander was at that time but eighteen years "old, and could not act by himſelf, the ſheriff the Earl of Huntly ap- "pointed him curators. Theſe curators named by the Huntly family, "acted as might have been expected of them. For after conferences "with Eliſabeth Sutherland and Adam Gordon, they agreed, or, as "the inſtrument of reſignation, hereafter to be mentioned, expreſſes it, "[*Curatoribus*] *pro concordia colloquentibus, tandem in unum convene- "runt et appunctuarunt*, that Alexander ſhould renounce, in favour of "his *brother* John and his *ſiſter* Eliſabeth, and their heirs, his *chance of "ſucceſſion* to the eſtate of Sutherland, for an annual rent of 40 merks "to be paid him by Adam Gordon; but that it ſhould return to himſelf, if "they had no heirs. The renouncing words are, *Quod ipſe Alexander "juri ſuo in et ad dictum comitatum, in favorem dicti Johannis Su- "therland, et Eliſabeth Sutherland, heredumque ſuorum, pro certa "compoſitione, renunciaret*. And to fix Alexander the faſter, he is "bound to ſwear never to impugn this tranſaction, and to renounce the "objection of minority and reſtitution *in integrum*."

REMARK.

Adam Gordon cannot be cenſured on account of his having concurred in the brieve for ſerving John Sutherland heir to his father. According to Sir Robert Gordon's own argument, he might have had a pretence for oppoſing that ſervice, upon the ſuppoſition that John was an idiot, and Eliſabeth the next in ſucceſſion.

That "the ſervice was to proceed before the Earl of Huntly, Adam's own "brother," is inſinuated as a circumſtance preſuming ſome foul machination; and yet Sir Robert Gordon, in the very ſame ſentence, ſhows, that the ſervice proceeded properly before the Earl of Huntly, for that he was "ſheriff of the "county."

Surely it would be ſuperfluous to prove, that the ſervice ought to have proceeded before the ſheriff of the county (*r*).

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*r*) See *Reg. Majeſtatem*, l. 3. c. 28. *Stat. Rob.* III. c. 1. *act* 127. *parl.* 9. James I.

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What title Alexander had to oppoſe this ſervice, is difficult to underſtand. It is plain that it was not as Sir Robert Gordon conjectures, becauſe "Alexander might repreſent John as an idiot, and thereby object to his capacity of "being ſerved." For the very inſtrument here quoted, ſets forth, that Alexander aſſerted, "*ſe in dicto comitatu jus hæreditarium habere.*" Reaſon I. Preſump. 9.

As Sir Robert Gordon admits, that John was the *eldeſt* ſon of the former Earl, it is to be conſidered how Alexander, even ſuppoſing him legitimate, could have right to the earldom of Sutherland. By the courſe of ſucceſſion it is evident he could not.

Alexander has conſtantly been conſidered as a baſtard, and it would ſeem that till of late he was ſo conſidered by Sir Robert Gordon himſelf.

But it does not from thence follow, that Alexander was a baſtard in the modern acceptation of the word; that is, the fruit of an immoral intercourſe with a lewd woman.

If his mother, the daughter of Roſs of Balnagown, was in the degree of *fourth in kin* to John Earl of Sutherland, and had married him without a Papal diſpenſation, the offspring of that marriage would, in the times of Popery, have been as completely illegitimate, as if the mother had been the moſt abandoned low proſtitute in the kingdom; with this difference indeed, that the Earl of Sutherland, in the reign of James IV. by marrying the proſtitute, would have legitimated the child; whereas a child born to him by his couſin could not be legitimated without an expenſive interpoſition of Papal authority.

It might ſeem invidious to ſearch into the family-hiſtories of the Scottiſh nobility for examples of this nature, ſuch however may be found.

Had the claimant imagined that Sir Robert Gordon was to have reared up any argument from the tranſactions concerning Alexander Sutherland, ſhe would have furniſhed him with an inſtrument; it is the only writing extant, ſo far as ſhe knows, from whence the nature of Alexander's claim may be conjectured.

When the ſervice of Eliſabeth Sutherland was about to proceed, upon the 3d October 1514, Robert Munro, the *brother* and procurator of Alexander Sutherland, was admitted to object to the breve. It appears, that he made none of the exceptions receivable by act 94. parl. 6. James IV. 1503, *i. e.* "againſt the "judge, againſt the inqueſt, and the exceptions of baſtardy." But, "per ce-"dulam in ſcriptis porrectam allegavit, *terras et comitatum* Sutherlandiæ, per "cartam Domini Regis, *talliatas ſeu talliatum eſſe.*" Munro was called upon to produce this *charter of entail*, but he produced it not (*s*).

Here

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*s*) "In Dei nomine, Amen. Per hoc præſens publicum inſtrumentum cunctis pateat "evidenter, Quod anno Incarnationis Dominicæ 1514to, menſis vero Octobris die tertiâ, "indictione ſecundâ, pontificatûs Sanctiſſimi in Chriſto Patris et Domini noſtri Domini "Leonis, divinâ providentiâ, Papæ Decimi, anno ſecundo, in mei notarii publici, et teſtium ſubſcriptorum, præſentia, perſonaliter conſtitutus in curia vicecomitis de Inverneſs, die datæ præſentis publici inſtrumenti, in prætorio de Inverneſs, per providum "virum Andream Auchleck, burgen. de Inverneſs, et vicecomitem deputatum, pro deſervitione unius brevis inquiſitionis capellæ regiæ impetrat. per Eliſabeth Sutherland, "ſororem quond. Johannis Comitis de Sutherland, de et ſuper terris et comitatu de "Sutherland,

Reaſon I. Preſump. 9.

Here there are traces of the nature of Alexander's claim. It was not in right of blood, but as an heir of proviſion *per cartam talliæ*; and it is poſſible that John Earl of Sutherland may have executed ſome ſettlement, to the prejudice of his right heirs, in favour of Alexander Sutherland.

Such ſettlements are not without example in the hiſtory of the great families of Scotland.

What particular exceptions there may have been againſt this deed, ſuppoſing it to have exiſted, cannot now be known.

Beſides its irrationality, it may have been made *contra fidem tabularum nuptialium*.

For proving that Alexander was the lawful ſon of John Earl of Sutherland, Sir Robert Gordon ſeems to reſt much upon an expreſſion in an inſtrument immediately to be mentioned, where it is ſaid, "ex adverſo comparuit Alexander "Sutherland *filius etiam* dicti Comitis;" and that the force of this expreſſion may be the more perceived, ETIAM is printed in capital letters. As John is ſaid to be *filius legitimus*, and Alexander *filius etiam*, the inference ſeems to be, that Alexander was *filius* in like manner as John, that is, *filius legitimus*.

That Alexander in his claim deſcribed himſelf as *filius* of the Earl of Sutherland is plain; but it is equally plain that the word *etiam* is the operation of the notary who framed the inſtrument; for that Alexander in his claim could never have referred to the claim of John, his competitor.

The word *filius* means nothing elſe than *ſon*, without relation to legitimacy or illegitimacy; it reſpects the natural, not the civil relation. In Scotland it

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

"Sutherland, comparuit venerabilis vir Magiſter Joannes Calder, procurator Roſſen. ac-
"tornatus, et eo nomine dictæ Eliſabeth, cum mandato lecto et admiſſo hujuſmodi breve
"legitimè, ut aſſeruit, proclamatum, executum, et indorſatum, produxit, et executionem
"ejuſdem probari fecit; et hoc in præſentia cujuſd. Magiſtri Roberti Munro, fratris et
"procuratoris Alexandri Sutherland, ad quantum dictum breve excipien. prætenden. et
"intereſſe habere allegan.: Et quia præfatus Magiſter Robertus, procurator pro dicto A-
"lexandro admiſſus, nihil tunc quantum dictum breve, proclamationem, et executionem
"ejuſdem, aut quantum membra curiæ oppoſuit, aut in ſpecie allegavit, dictus vicecomes
"deputatus, ad electionem aſſiſæ pro deſervitione dicti brevis proceſſit, et eandem aſſiſam
"jurari fecit, tactis ſacris Dei evangeliis: Et quia dictus procurator præfati Alexandri,
"per quandam cedulam in ſcriptis porrect. allegabat, quod non patebat tutus acceſſus
"dicto Alexandro ad burgum de Inverneſs, ad defendend. quantum dictum breve, pro-
"pter ſervitiam Alexandri Comitis de Huntlie, et amicorum ſuorum dictæ Eliſabeth fa-
"ven. idem, dictus Comes, et Adam Gordon de Aboyn, ejus frater, ſponſuſque dictæ
"Eliſabeth, pro ſe, et ſuis conpluribus, obtulerunt dare cautionem dicto Alexandro legi-
"timam, et ſub magnis pœnis, adeund. et redeund. ad burgum de Inverneſs, pro ſua legi-
"tima defenſione utenda. Poſt hæc, quia præfat. procurator, per hujuſmodi cedulam
"in ſcriptis porrectam, allegavit, terras et comitatum Sutherlandiæ, per cartam Domini
"Regis, talliatas ſeu talliatum eſſe, unde per aſſiſam electam et juratam, et vicecomes de-
"putat. ad hujuſmodi cartam talliæ producend. poſtulat. fuit procurator prius hujuſmodi
"cautionem oblatam nullam tunc talliæ cartam produxit; et ſic aſſiſa ad retornationem
"dicti brevis proceſſit. De et ſuper quibus omnibus et ſingulis," &c.

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was often uſed, and even in very early times, where the perſon ſo ſtyled was confeſſedly illegitimate (*t*). Reaſon I. Preſump. 9.

"As Alexander was but eighteen years old, the ſheriff, the Earl of Huntly, "appointed him curators." Sir Robert Gordon adds, "Theſe curators, named "by the Huntly family, acted as might have been expected of them."

Surely the Earl of Huntly deſerved no cenſure for naming curators to a minor in the ſituation of Alexander Sutherland: it was the duty of his office; and had he omitted it, he might have been termed partial and oppreſſive.

Poſterity will judge of every one as he deſerves: in *dedications*, *epitaphs*, and *peerages*, thoſe wretched monuments of vanity and adulation, it will not ſeek for the characters of men; but as it is *juſt*, it will be *candid*, and will not brand men with perpetual infamy, as violators of their moſt ſolemn oath, as betraying their truſt, and abandoning a defenceleſs orphan, merely becauſe they were appointed curators by the Earl of Huntly, ſheriff of the county.

Thoſe curators were *five* in number. *Willielmus Spine Præpoſitus de Thane*, and *Thomas Roberti Rector de Aſſynt*, are obſcure men, unknown in hiſtory; and therefore Sir Robert Gordon may, without contradiction, repreſent them as *ſcelerates*.

But it might have been expected that he would have ſhewn more indulgence to *William Earl of Caithneſs*, the ſon of his *own creature* Marjory, *heir-general of the Sutherland family!*

Another curator was Andrew Stewart, Biſhop of Caithneis; from his *office*, the proper guardian of minors within his dioceſe; from his *country*, no dependent on the family of Huntly; by a like *macula natalium*, a wellwiſher of Alexander Sutherland (*u*).

The *fifth* curator was *John Maſter of Athol*, the anceſtor of the preſent Duke of Athol, one of high rank and fortune, as well born as any of the parties, and who proved himſelf a man of honour, by dying with his ſovereign at Flodden field.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*t*) A few examples ſhall be here ſubjoined.

"Duncanus filius Malcolmi [III.]" is mentioned, *Rymer*, t. 2. p. 561. He was undoubtedly illegitimate.

Every one knows, that Malcolm IV. ſurnamed the *Maiden*, was never married; and yet in *Ch. Kelſo*, fol. 16. b. there is a grant by him to a church, "Ubi corpus *filii mei* "primâ poſt obitum nocte quievit."

Robert Bruce calls his baſtard ſon Robert, by the name of "dilectus *filius meus*." See *Authorities* quoted by *Douglas*, Peerage, p. 131.

"Thomas Stewart, *filius* Alexandri Stewart Comitis de Marr," obtained a grant from James I. *Record* Charters, 28th May 1426, b. 7. N° 8. His baſtardy is undiſputed. See chap. 5. § 11.

James IV. granted the earldom of Moray, then in the crown by forfeiture, "Jacobo "noſtro *filio*, et hæredibus," &c. There are other examples of the ſame nature; but theſe may ſuffice.

(*u*) "A natural ſon of the houſe of Invermeath, [ſettled in Perthſhire], whoſe legi-"timation is to be ſeen in the public records." *Keith*, Catalogue of Scottiſh Biſhops, p. 127.

Reaſon I. Preſump. 9. What is a fair fame tranſmitted to ages unborn, if the overflowings of every foul ſtandiſh can pollute it!

It is ſaid, that thoſe guardians agreed, for a certain ſum covenanted, "that Alexander ſhould renounce, in favour of his *brother* John, and his *ſiſter* Eliſabeth, and their heirs, his *chance of ſucceſſion* to the eſtate of Sutherland."

No veſtiges of the *kindred* appellations of *brother* and *ſiſter* can be diſcerned in all this compromiſe.

Neither are there any words correſponding to *his chance of ſucceſſion*. There was no queſtion as to a *chance of ſucceſſion:* Alexander Sutherland claimed a *jus hæreditarium*, and he renounced *juri ſuo*; that is, "his right, or claim, or grounds of claim, to the inheritance (*x*)."—Such is the true interpretation of the Latin phraſes uſed in the inſtrument 1509. Concerning *a chance of ſucceſſion* the inſtrument ſays nothing.

Neither does it mention the *chance of ſucceſſion returning* to Alexander on the failure of John and Eliſabeth, and the heirs of their bodies.

The unambiguous meaning of the compromiſe is, that on the failure of John and Eliſabeth, and their heirs, the claim of Alexander ſhould remain entire, as if no compromiſe had been ever made.

It is added, "That to fix Alexander the faſter, he is bound to ſwear never to impugn this tranſaction, and to renounce the objection of minority and reſtitution *in integrum*."

This oath ſeems to have been adminiſtered according to the uſage of the Canon law. In the law of Scotland, properly ſo called, it was ineffectual (*y*); and it will hereafter appear, that Alexander Sutherland inſiſted in his claim, juſt as if the oath had not been adminiſtered.

HISTORICAL DELINEATION.

p. 6. 7. "All theſe things appear, from an inſtrument of renunciation, dated 24th July 1509, wherein Adam Gordon being preſent is the perſon, and not his wife, who delivers the ſecurity to Alexander for the forty merks, *pro quadam compoſitione et contentatione quadraginta mercatarum terrarum eidem Alexandro, per dictum Adam Gordon, per chartam et faſinam datarum*; and his brother, the Earl of Huntly, is acting as ſheriff. The reaſon why this remuneration to Alexander was made by Adam is obvious: for though this renunciation was in favour

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*x*) There is much labour beſtowed by Sir Robert Gordon on the interpretation of the words *jus ſuum*, p. 38. If *jus ſuum* meant a right intrinſically good, it follows, that whenever one competitor renounced in favour of another, the perſon renouncing had the juſtice of the cauſe on his ſide; for he always renounced *juri ſuo:* in other words, every man who gave up his pretenſions, ought to have prevailed in them.

(*y*) Reg. Mag. lib. 2. c. 8. § 2.

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" of Adam's wife, yet he was to have all the benefit of it; ſeeing by the " law of Scotland he muſt have the *jus mariti* during her life, and the " courteſy of the eſtate after her death." Reaſon I. Preſump. 9.

" The renunciation took effect: for in the account rendered 23d July " 1512, by Andrew Biſhop of Caithneſs, to King James V. [r. IV.], in " the exchequer, for the rents of the earldom, as then due to the King " by nonentry, there is this article to the credit of the accountant: *Et* " Alexandro Sutherland, *filio quondam* Johannis *Comitis* Sutherlandiæ, " *in quadraginta marcis, per literas Domini Regis, ſub ſubſcriptione* " *direct. auditoribus ad allocand. de anno compoti XXVI. XIII. Sol.* " *IV.*"

REMARK.

Sir Robert Gordon might have diſcovered a much more ſatisfactory reaſon why the remuneration was made by Adam. It was in the form of an heritable ſecurity: now John Sutherland could grant no ſuch ſecurity, as not being ſerved and infeoffed in the earldom; neither could Eliſabeth, as not being poſſeſſed of any land-eſtate.

There is one circumſtance which ought not to have been paſſed over in ſilence; and that is, the number and the rank of the witneſſes to this tranſaction, which of itſelf ſhews, that every thing was conducted in the view of the world, without ſecret machination or diſguiſe.

Among the witneſſes to this tranſaction there appear Thomas Fraſer *Dominus de Lovat*, John Grant of Freuchy, Hugh Roſe of Kilravock, and Alexander Ogilvy, heir-apparent of Sir James Ogilvy of Deſkfurd; the moſt powerful barons who were *ſectatores curiæ*, or bound to give *ſuit and preſence* at the ſheriff-court of Inverneſs (*z*).

HISTORICAL DELINEATION.

p. 7. " Adam Gordon having thus got one brother to renounce his right in " the eſtate, proceeded next to the other. In order to frighten Earl " John, he took out a breve of idiocy againſt him in May 1514, and " went ſo far, as to ſet a jury upon him. But to ſtop the effect of this, Earl " John judicially agreed to declare, that Eliſabeth Sutherland, and her iſſue,

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*z*) The mention of Thomas Fraſer, *Dominus de Lovat*, ſhews how ill founded Sir Robert Gordon's criticiſm is, p. 35. as to the article *de* being the diſtinction of a *Laird*, oppoſed to *a Lord of Parliament*. He himſelf obſerves, p. 29. that the family of Lovat were made peers before 1480; and yet there occurs in 1509, " Dominus *de* Lovat," according to Sir Robert's hypotheſis, a *ſimple Laird*.

" failing

Reaſon I. Preſump. 9.

" failing his own, ſhould ſucceed to the eſtate, and to give his full and " ample conſent to ſuch right of ſucceſſion in a inſtrument then prepa- " red. Earl John was farther prevailed upon to name Adam Gordon, " and another perſon, his curators and managers. After theſe conceſ- " ſions Adam Gordon proceeded no farther in the breve of idiocy."

REMARK.

The *breve of idiocy* reaches to every one who is not of ſound mind, be he *furioſus*, *fatuus*, or *mente captus*. Whether Earl John was ſuppoſed to be an *idiot* in the vulgar ſenſe of the word, or whether he was rather a lunatic, with lucid intervals, is a point which from want of evidence muſt remain doubtful: at the ſame time, the whole ſtrain of the proceedings concerning him, render it more probable that he was a *lunatic*, than a *natural fool*, as our law ſpeaks.

Sir Robert Gordon is pleaſed to aſſert, " That Adam Gordon, to *frighten* " Earl John, took out a breve of idiocy againſt him, and went ſo far as to ſet a " jury upon him.

If Earl John was within the deſcription of the breve, the interpoſition of a jury was proper; if he was not, the conduct of Adam Gordon would more naturally have excited conſcious indignation than fear.

It is probable that Sir Robert's counſel have forgot, that the anſwer to this breve was to be made in chancery upon the oath of fifteen jurors; and that the proceedings upon it were *at Perth*, not *at Inverneſs*, where it ſeems the nod of the Earl of Huntly was law.

Let the meaning of the word *frighten* be exactly weighed; it will then appear, that Adam Gordon thus addreſſed himſelf to his brother-in-law: " Unleſs " you declare, that Eliſabeth Sutherland is your lawful ſucceſſor, failing heirs " of your own body (*a*), and at the ſame time *interdict yourſelf to me*, I will " inſtantly convey you to a neutral place in the low country, where I will pro- " cure an aſſize of fifteen gentleman to ſwear, that you are an idiot, or a lu- " natic. And *this* ſhall be done in the preſence of the Earls of Errol and A- " thole, of the Lords Ruthven and Glamis, and of many other perſons of diſ- " tinction."

Is not this a fair interpretation of the word *frighten*, as explained by the only evidence to which Sir Robert Gordon appeals?

It has been already obſerved, that, from defect of evidence, it is impoſſible to aſcertain what was the ſtate of Earl John's mind.

If his intellects were weak or diſordered, the preſumption of nature is, that

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*a*) In this part of the Caſe, Sir Robert Gordon has forgot his own hypotheſis, and uniformly tranſlates *hæredes de corpore* by the word *iſſue*, inſtead of *heirs-male of the body*.

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he would be apt to waſte his eſtate, and ſtill more apt to make ſettlements of it, with a limitation of heirs (*b*). Reaſon I. Preſump. 9.

In this view of the caſe, the conduct of Adam Gordon was not injudicious: While Earl John was in a neutral place, and ſurrounded by ſtrangers, unconnected with the family of Sutherland, he was called upon to declare, *who* was his heir; and it ſhall be ſuppoſed, that he was moved to interdict himſelf (*c*).

Thus was an obſtacle thrown in the way of thoſe who might aim at eliciting ſettlements from him.

Suppoſe, for example's ſake, that Alexander Sutherland, turbulent and enterpriſing as he is confeſſed to have been, had obtained ſuch a ſettlement in his own favour. The proceedings at Perth would have met him. If he held Earl John as of ſound mind, the declaration of ſucceſſion, and the voluntary interdiction, would have been oppoſed to him, on the one ſide; but if he held Earl John as not of ſound mind, the impropriety of obtaining a ſettlement from one of unſound mind would have been oppoſed to him, on the other.

Whether Adam Gordon meant to have proceeded farther in the breve of idiocy, is impoſſible to determine. For it is admitted, that Earl John died immediately after the tranſactions at Perth.

The probability, however, is, that he would not have proceeded to extremities. It is believed, that in 1514 the King had the cuſtody of thoſe who were cognoſced upon a breve of idiocy; and that it was not till act 18. parl. 10. James VI. that the right of the neareſt agnate was admitted.

HISTORICAL DELINEATION.

p. 8. "Earl John died in July 1514. His ſiſter was, upon the 3d of October "following, ſerved heir to him in his eſtate, without taking any notice "of Alexander, and as if *he* had been dead alſo. But as ſhe had no "claim to the peerage, on account of being a female, and of her brother "Alexander's being living, ſhe was ſerved by the name ſimply of *Eliſabeth Sutherland*, not of *Counteſs of Sutherland*. In the inſtrument "of ſeiſin, which is dated ſo low as the laſt of June 1515, her being a "*gentlewoman*, and not a peereſs, is ſtill more ſtrongly marked: for

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*b*) Every lawyer of practice knows that this obſervation is juſtified by experience. Within the memory of many yet living, there exiſted a perſon of ſome rank who amuſed himſelf, during the courſe of a long life, in making diſcordant ſettlements of his eſtate; and at length, on deathbed, conveyed it to his heir at law. There was alſo another, an attorney, who, after waſting a ream of paper on ſettlements, left the bulk of his fortune, not *for* erecting a foundling-hoſpital, but *to* a foundling-hoſpital in caſe it ſhould be erected.

(*c*) A voluntary interdiction is known and approved in law; and yet no judge ever imagined that ſuch *interdiction* was *voluntary* in the logical ſenſe of the word, as proceeding from the unbiaſſed motion of the will of the party.

Reaſon I. Preſump. 9.

" ſhe is only called a *Noble Damſel, Nobilis Dominicilla Eliſabeth Su-*
" *therland, ſponſa providi viri Adæ Gordon de Aboyn.*"
" *It merits attention*, that at the date of this ſeiſin, the laſt day of
" June 1515, Adam Gordon was not Earl of Sutherland: for, inſtead
" of being called *Nobilis et Potens Dominus Comes de Sutherland*, he is
" called *providus vir* Adam Gordon de Aboyn."

REMARK.

Sir Robert Gordon is not ſatisfied with declaring Alexander to be legitimate, although all the world had conſidered him as illegitimate for 250 years: he proceeds one ſtep farther; and, by his own private authority, he declares him to be the *frater germanus* of John, as Eliſabeth was the *ſoror germana.*

This is the purport of his obſervation here. For if Eliſabeth was John's ſiſter of full blood, and Alexander his brother of half blood, it is demonſtratively plain, that Eliſabeth would have been authoriſed to ſerve herſelf heir to John, whether Alexander was legitimate or illegitimate, whether dead or alive.

John was infeoffed in December 1512. Now, who could take up the *hæreditas jacens* of John, and feudally connect with him, but his ſiſter of full blood? It is plain, therefore, that unleſs Alexander was the brother-german of John, his legitimacy, though proved, would have ſignified nothing.

Although Eliſabeth took no notice of Alexander, yet Alexander did not ſuffer her ſervice to paſs without obſervation. It has been already mentioned, that his brother Robert Munro, as attorney for him, appeared, and pleaded on a ſuppoſed *charta tallie*; which, however, he produced not.

This is one example out of many which have occurred in reviewing the *Supplemental Caſe*, how much more completely one may be acquainted with a cauſe, after the lapſe of two or three centuries, than the parties themſelves were.

Alexander Sutherland aimed at the proof of *a limitation to heirs of entail:* but he miſtook his cauſe; he ought to have pleaded on *proximity of blood!*

The evidence that Eliſabeth Sutherland was a *gentlewoman, not a peereſs*, on the 30th of June 1515, is rather ſingular, when, but two pages before, Sir Robert Gordon had produced an inſtrument, repeatedly mentioning " *Johannes,* " *filius et hæres quondam Johannis Comitis de Sutherland.*"

According to Sir Robert Gordon, this inſtrument proves, that John was " *a gentleman, not a peer,*" after the death of his father. Had he been a peer, he would have been ſtyled, *Nobilis et Potens Dominus Johannes Comes de Sutherland.*

The truth is, that it was cuſtomary in Scotland to ſerve the eldeſt ſon of a peer heir to his predeceſſor, under his ſimple name and ſurname, without any addition of titles of honour.

It is an irkſome taſk to be obliged to prove what ought to be known by every one who pretends to diſcourſe of the antiquities of the Scottiſh law.

Beſides the example of Earl John, juſt now mentioned, more than one example of this practice occurs in the family of Sutherland itſelf.

John,

John, the grandſon of Eliſabeth, was ſerved heir in the earldom to Alexander, his father, under the appellation of *John Gordon* (*d*). Reaſon I. Preſump. 9.

In like manner, Alexander his ſon was ſerved heir to him, under the appellation of *Alexander Gordon* (*e*).

The Earls of Angus were uſually ſerved heirs to their predeceſſors, under the ſimple deſcription of *Archibald Douglas*, &c. without the addition of any title of dignity (*f*).

The claimant will add two or three more examples: were it neceſſary, ſhe might add ſtill more.

1. Precept of *Clare conſtat*, by John Lord Glamis and his tutor, in favour of *John Stewart*, neareſt and lawful heir of Alexander Earl of Buchan, his father, 30th May 1506.

2. Inſtrument of ſeiſin, in favour of *John Graham*, neareſt and lawful heir of William Earl of Monteith, his father, 9th September 1545.

3. Inſtrument of ſeiſin, proceeding on a precept from chancery, in favour of *John Maſter of Ereſkine*, as heir of John Lord Ereſkine, his father, 8th November 1555.

The criticiſm upon the word *domicilla*, is ſtrange: for the word properly means *an unmarried or young princeſs* (*g*). Thus Margaret, the grand-daughter of Alexander III. is in the ſame inſtrument ſtyled *Domina Regina, et hæres regni Scotiæ*, and *Domicella* (*h*). The only inference, therefore, that can be drawn from the mention of the word *Dominicilla*, is, that Eliſabeth Sutherland received an appellation which more peculiarly belonged to the royal family.

HISTORICAL DELINEATION.

p. 8. "But Adam's ambition was ſtill unſatisfied, unleſs he got the peerage "of Sutherland alſo. The time which offered itſelf for this was upon the "arrival of the Duke of Albany, to take the regency of Scotland, in ſummer 1515. That Duke had been educated in France, and was a ſtranger "to Scotland. He had many points to carry: he was to defend his title "of Regent againſt the Queen, the kingdom againſt Henry VIII. himſelf againſt his enemies, the powerful Lords of Home and Angus, and "the general mutinous diſpoſition of the Scottiſh nobility, and to ſecure "an act of parliament, declaring him next heir to the crown, failing

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*d*) *Service*, 4th May 1546, produced by the claimant.

(*e*) *Service*, 8th July 1573, produced.

(*f*) See *Appendix* for Archibald Douglas of Douglas, Eſq; an authority appealed to by Sir Robert Gordon in his *Supplemental Caſe*.

(*g*) See *Du Cange*, Gloſſ. vv. *Domicellus*, *Domicella*.

(*h*) *Rymer*, t. 2. p. 448.

"iſſue

Reaſon I. Preſump. 9.

" iſſue of James V. It it certain from hiſtory, that, to protect himſelf " from thoſe of the Home and Angus faction, he ſent for troops from " France." *Stewart*'s Hiſtory of the Stewarts.

REMARK.

The claimant is not engaged to write a hiſtory of Scotland; and therefore ſhe will ſlightly paſs over this account of Scottiſh affairs in ſummer 1515. She will juſt obſerve, that the Duke of Albany was called to the office of Regent by the means of Lord Home, contrary to the wiſhes of the Queen, and of the Angus faction; that the Queen never diſputed the office with the Duke of Albany; that Henry VIII. had no inclination to attack Scotland; and that Stewart's *Hiſtory of the Stewarts* is now, for the firſt time, quoted as a book of authority.

HISTORICAL DELINEATION.

p. 9. " At this diſtance of time, it is not incumbent upon Sir Robert Gor- " don to ſpecify the mean by which the peerage was transferred from the " old Sutherland family to Adam Gordon, or the mode of creation by " which the transfer was made good. It is very probable, that he had " got either John, who was weak, or Alexander, who was dependent " upon him, the one having given up to him the management of his e- " ſtate, with the ſucceſſion to it, and the other his *birthright* in the e- " ſtate, either to *reſign the peerage* in his favour, or to give ſuch con- " ſent to the transfer as was, according to the cuſtom of the times, a " ſufficient warrant for obtaining a new grant. *It is alſo poſſible*, that " Alexander *may have been attainted*, either in the *rebellions* which " ſucceeded the Duke of Albany's arrival, or on account of his outra- " ges to get poſſeſſion of the Sutherland eſtate by force, which he had " renounced."

REMARK.

It is pitiful to ſee how Sir Robert Gordon bewilders himſelf in conjectures; and the heſitation in this paragraph is curiouſly contraſted with his triumphant ſumming up of the evidence, where, inſtead of ſaying, *it is poſſible*, or *it is not improbable*, he ſpeaks of " *the irreſiſtible concatenation of proofs.*"

When it is conſidered, that lands, juriſdictions, and dignified fiefs, were deſcendible to *heirs-general*; that by *hæredibus ſuis* was implied *heirs-general*; that the *comitatus* of Sutherland ſtood ſo limited in the perſon of Eliſabeth's father; that Eliſabeth was ſerved lawful heir to her brother John, and enjoyed both the eſtate and the dignity;—there will be no room left for conjectures; every thing will be plain and ſimple in the tranſmiſſion of the eſtate and dignity of Sutherland,

Sutherland, and will appear to have happened according to the common courſe of the law and uſages of Scotland. Reaſon I. Preſump. 9.

The only thing left to be accounted for, is the circumſtance of Adam Gordon's having aſſumed the ſtyle of *Earl of Sutherland*. And this alſo will be accounted for by ſhewing, that Adam Gordon, in aſſuming the title of *Earl*, did no more than what the huſbands of peereſſes had been accuſtomed to do for many centuries before, and what they did for a century after.

This the claimant has partly made appear in the 5th chapter of this caſe; and ſhe will, in the ſequel, make appear by more connected evidence.

Sir Robert Gordon ſaw, that Adam, the huſband of the Counteſs of Sutherland, aſſumed the ſtyle of *Earl:* hence he ſuppoſes not only *a creation*, but alſo a limitation of the title to *heirs-male*.

In order to make way for this creation, it became neceſſary to diveſt the old family of the dignity of Earl.

The death of John, and of his newly legitimated brother Alexander, would not ſerve the purpoſe.

That all the male deſcendents of all the Earls of Sutherland had failed in 1515, was too extravagant an idea to be entertained.

Mr Sutherland of Forſe had proved, that an heir-male deſcended of the ancient Earls of Sutherlands, exiſted in 1514.

If any credit is to be given to the univerſal opinion of Scotland, the family of Duffus, now forfeited, could have traced their pedigree from Kenneth Earl of Sutherland, ſlain at Hallidonhill in 1333.

There are *three* ſeveral hypotheſes which Sir Robert Gordon here *ſuggeſts*; for indeed he does not ſeem to *maintain* any one of them.

1. A reſignation by John, in favour of Adam Gordon. 2. A like reſignation by Alexander. 3. A forfeiture of Alexander, by which the dignity returned to the crown, and was conferred on Adam Gordon by the Duke of Albany, Regent.

As to the *firſt*, a reſignation by John, it is an utter impoſſibility.

It reſts on this fundamental error, That a reſignation of the dignity, without reſigning the dignified fief, was known in Scotland about 1515.

Beſides, if the reſignation of a bare title of honour had been then known, why would John have reſigned it to any one but to the heir of his eſtate?

But, what is ſtill worſe, this hypotheſis is inconſiſtent with that obſervation to which Sir Robert Gordon had juſt before ſummoned all the attention of his readers, "That Adam Gordon was a commoner on the 30th June 1515."

In June 1514, John declared, that Eliſabeth was his lawful heir; in July 1514, he died; in October 1514, Eliſabeth was ſerved neareſt and lawful heir to him; and in June 1515, ſhe was infeoffed.

It follows, that John muſt have made this reſignation in the laſt month of his life; and that it was not accepted till a year after his death.

Suppoſing him to have made the reſignation ſooner than June 1514, it will be ſo much the worſe for Sir Robert Gordon's hypotheſis.

The claimant deſires to know, *who* was Earl of Sutherland between July 1514 and the arrival of the Duke of Albany in Scotland in June 1515; at

Reaſon I. Preſump. 9. which time it is averred, that Adam Gordon was a commoner; and after which time it is averred, that he was created Earl by the Duke of Albany, Regent.

Sir Robert Gordon, if he is conſiſtent with himſelf, muſt hold, that Alexander was Earl of Sutherland during that period. —— And this leads the claimant to examine his *ſecond* ſuppoſition, a reſignation by Alexander.

This ſeems for a while to be reliſhed by Sir Robert as a mighty probable conjecture: for he obſerves, "That Alexander was dependent on Adam, and had "given up his *birthright* to him."

How Alexander gave up his *birthright* to Adam Gordon, is hard to ſay: the compromiſe in favour of Eliſabeth and her heirs, can hardly be ſaid to be a ſurrender of a *birthright* to the huſband of Eliſabeth.

That Alexander was *dependent* on Adam Gordon, is altogether a miſtake; and Sir Robert himſelf has produced much evidence from the records of the privy council to prove, that for many years Alexander maintained his *independency*, not only againſt Adam Gordon, but againſt the laws of his country.

If Sir Robert had looked into the hiſtory of the family of Sutherland, compiled by his predeceſſor, he would have ſeen enough to ſatisfy himſelf, that Alexander was not of a diſpoſition to reſign the peerage of Sutherland to Adam Gordon, ſuppoſing that he had a right in it, and that ſuch a meaſure had been known in thoſe days.

Can a greater contradiction be figured, than that Alexander ſhould poſſeſs himſelf of the caſtle of Dunrobin, contrary to the ſolemn compromiſe 1509, and yet reſign the title of honour to Adam Gordon?

The error in the *third* ſuppoſition is not ſo obvious as that in the other two: it is, however, an error.

Sir Robert conjectures, that Alexander *may* have forfeited; and that upon his forfeiture Adam Gordon *may* have been created Earl of Sutherland.

Here he takes it for granted, that Alexander was Earl of Sutherland, which is contrary to his *firſt* ſuppoſition; and that he forfeited, which is contrary to his *ſecond*.

Here alſo, as in other parts of the *Supplemental Caſe*, there occur a preſumed rebellion, and a preſumed forfeiture.

"It is poſſible," ſays Sir Robert Gordon, "that Alexander may have been attainted, either in the rebellions which ſucceeded the Duke of Albany's arrival, "or on account of his outrages to get poſſeſſion by force of the Sutherland eſtate, which he had renounced." And in p. 12. he avers, "That the creation of Adam Gordon muſt have happened between the 30th June 1515, and "the 3d September 1516."

The claimant does not ſee, from hiſtory, that there were any rebellions upon the Duke of Albany's arrival. Sir Robert may, if he chuſes it, dignify with that appellation the conduct of the factions of Angus and Home; but why ſhould Alexander Sutherland, a very young man, and a native of the other extremity of Scotland, be ſuppoſed to have been the partiſan of either faction?

Beſides, the two writings produced by Sir Robert, dated 12th October 1515, prove, that at that time there was no forfeiture; and the multitude of writings produced,

produced, from 26th March 1517, to penult February 1517-8 (*i*), prove, that Alexander had a *perſona ſtandi* during that period. Reaſon I. Preſump. 9.

It is conjectured that Alexander had incurred the pains of forfeiture, becauſe he was *in ward* during September 1517 and February 1517-8.

Any one who knows what *a charge to enter in ward*, and the *being in ward*, implied, needs not be informed, that the circumſtance of Alexander's being *in ward* confutes the conjecture.

If Alexander's outrages in Sutherland had occaſioned his forfeiture between the end of 1515 and the beginning of 1517, there can be no reaſon for preſuming, that his after conduct would have procured ſo ſpeedy a pardon and reſtoration. Sir Robert Gordon himſelf has furniſhed evidence, that the outrages of Alexander, inſtead of ceaſing, roſe to the moſt daring acts of violence (*k*).

Thus it appears, that the *third* ſuppoſition, of the forfeiture of Alexander Sutherland between June 1515 and September 1516, is juſt as ideal as the *firſt* and *ſecond* (*l*).

But although this forfeiture ſhould, for argument's ſake, be preſumed, ſtill Sir Robert Gordon has not overcome half the difficulties which ſtand in his way.

He muſt next *ſuppoſe*, that Adam Gordon was created Earl of Sutherland by the Duke of Albany, Regent.

The claimant is yet to learn, that a Regent of Scotland ever had, or pretended to the power of conferring hereditary titles of honour.

Of an original creation under a regency there is no example.

Indeed there could be none. A Regent is a tutor; and the powers of a tutor are limited to ordinary and neceſſary acts of adminiſtration; but the conferring of hereditary titles of honour can never be held an act of ordinary and neceſſary adminiſtration.

Hence it was determined in parliament, in 1431, That a Regent could not

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*i*) The counſel for Sir Robert Gordon imagine, that February 1517 is an earlier date than Auguſt 1517; conſiſtently enough with this they aver, that February 1517 in Scotland anſwered at that time to February 1516 in England.

(*k*) Were it neceſſary, more evidence to the ſame purpoſe might be produced from *the Hiſtory of Sutherland*, by Sir Robert's predeceſſor.

(*l*) It is obſerved, in manner of illuſtration, "that the fact as to Lord Home's attainder "in 1516, would be unknown, if the evidence of *his* reſtoration againſt the attainder had "not been accidentally preſerved in certain charters 1535." This is amazing inattention; for Buchanan, in b. 14. quoted by Sir Robert, gives an ample account of the whole circumſtances of the trial, conviction, and execution of Lord Home, and has not even omitted dates. See alſo *Pitſcottie*, p. 232. Glaſgow edition 1749. In a word, there is no one fact in the hiſtory of Scotland more diſtinctly known than this, nor do the charters 1535 convey half the information concerning it that is to be found in *every* hiſtorian of James V.

Reaſon I. Preſump. 9. give away from the crown any lands that had devolved to the crown by the death of a baſtard without heirs (*m*).

Hence alſo it was determined in parliament, in 1434, That a Regent could not reſtore a perſon forfeited for treaſon. *Sir George Dunbar* againſt *the King* (*n*).

If this aſſertion is confirmed by record and hiſtory as much as a negative can be confirmed, it muſt be fatal to Sir Robert Gordon's argument.

He is obliged to maintain, "That the Duke of Albany conferred, *by creation*,
p. 12. "the dignity of Earl of Sutherland on Adam Gordon;" and he ſays expreſsly, "in the intermediate ſpace between June 1515 and October 1516 *he muſt have* "*been created*; *there was no other way by which he could acquire the peer-*"*age* (*o*)."

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PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*m*) Parl. 10. Jam. I. c. 153.

(*n*) Parl. 12. Jam. I. c. 136. The reaſon given by Sir George Mackenzie for this judgement is, "becauſe a regent *is a tutor*." See Obſervations on act 133. parl. 10. Jam. I. Buchanan, from his political notions, was inclined to cenſure the government of the Stewart line; and, from his political connections, muſt have been inclined to extend the powers of a regent; and yet he does not condemn the judgement of parliament in 1434 as illegal. He gives the ſame reaſon for it which Sir George Mackenzie gives. That caſe muſt be clear where Buchanan and Sir George Mackenzie agree in principles.

(*o*) Sir Robert Gordon obſerves, that there is direct evidence by hiſtory, that Adam Gordon was created Earl of Sutherland by the Duke of Albany. He quotes Lord Stair, as ſaying, "That *hiſtories* are probative in all caſes, where the ſame is relevant, *if they be authentic*, "and not contradicted by more authentic hiſtories of the ſame time, as in the caſe of "propinquity of blood, or of antiquity and priority of dignity, titles of honour," &c.

This quotation is made with the view of introducing the following paragraph. "Jo-"hannes Ferrerius was a cotemporary of Adam Gordon, and *well verſed in the Scots* "*hiſtory*. He lived three years at court with Reid Biſhop of Orkney, a miniſter of ſtate, "at the very time when Adam Gordon was acknowledged Earl of Sutherland. In the "hiſtory of George Earl of Huntly, father of Earl Adam, the words of Ferrerius are "theſe: "Adamum ſecundo genitum Dominum de Aboyne inſtituit; cui poſtea per nup-"tias Eliſabetham Sutherlandiæ hæredem junxit matrimonio; qua de re Comes Suther-"landiæ *deinceps creatur*."

The counſel for Sir Robert Gordon have peruſed a late tract, intitled, "Examination of "ſome of the principal arguments for the high antiquity of *Regiam Majeſtatem*." In that tract, p. 20.—30. they might have ſeen an ample ſpecimen of the *great* knowledge of Ferrerius in the hiſtory of Scotland; and had they looked into his account of the abbots of Kinloſs *there* quoted, they would have perceived how mean his abilities were, and how contemptible his ſtation. It is believed, that Ferrerius did not come to Scotland till after the date of thoſe royal charters granted to Adam Gordon. That circumſtance, however, is of no moment; for a foreigner, of no rank, and ignorant of the Scottiſh manners and language, could know nothing of ~~honours, reſignation~~ of creations, or of courteſies. So monſtrouſly ignorant is he of hiſtory, that he aſſerts, that one of the Earl of Huntly's predeceſſors was created *Lord Gordon* by Malcolm III.; and that another of them, commander of a Scottiſh army, killed Richard I.

Let the condition of Ferrerius be modernized. A Norman comes over to London in the

It is hoped that this cardinal propoſition in Sir Robert's caſe will be conſtantly kept in memory. Reaſon I. Preſump. 9.

If no Regent on any other occaſion exerciſed ſuch a royal prerogative, it follows, that Sir Robert is obliged to found his hypotheſis upon this palpable improbability, That the Duke of Albany, a foreigner, and a ſtranger, in the very firſt days of his government over a jealous and high-ſpirited nation, ventured upon an act of power without example, and without imitation.

The counſel for Sir Robert Gordon perceived the force of this argument. They judiciouſly took up their ground for defence, and they averred, "That "there are a variety of creations by Regents in Scotland."

Could this ground have been maintained as ſucceſsfully, as it was judiciouſly taken up, the defence would have been made good, and the claimant would have been deprived of one collateral argument.

No fewer than *twenty* inſtances are produced of creations by Regents in Scotland. When cleared from many groſs typographical errors, and digeſted into chronological order, they ſtand thus.

JAMES I.

1. Between 13th May 1407, and 6th November 1413, John Stewart *Earl of Buchan.* Buchan.

JAMES II.

2. 1442, Sir Allan Cathcart, *Lord Cathcart.* Cathcart.
3. Between 13th May 1440, and 1449, Alexander Seaton, *Earl of Huntly.* Huntly.
4. 1445, Lawrence Abernethy, *Lord Abernethy of Salton.* Abernethy.
5. Between 27th April 1442 and 7th April 1450, William Crichton, *Lord Crichton.* Crichton.
6. About 1450, Moneypenny, *Lord Moneypenny.* Moneypenny.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

the *ſuite* of the Britiſh ambaſſador, with the hopes of being provided for as uſher of an academy in Yorkſhire: he remains three years upon the town, altogether ignorant of the Engliſh language. Such a perſon muſt be admirably well qualified for giving an account of the patents of honour of the Engliſh nobility: he certainly could tell when a title had *merged*, and when it was in *abeyance*.

Such was that Ferrerius, whoſe report, delivered in two words, is oppoſed to the united teſtimony of all the Scottiſh writers; and eſpecially to that of Sir Robert Gordon's predeceſſor. His words are, "Lady Eliſabeth married Adam Gordon of Aboyn, the ſe-"cond ſon of George Earl of Huntly; and *ſo their poſterity became, by this marriage, not "only Earls of* Sutherland, *but alſo lawful heirs by blood and ſucceſſion* to all the rights, "titles, privileges, precedency, and *all honours and dignities* whatſoever, pertaining to the "ancient Earls of Sutherland." To the ſame purpoſe ſpeak Roſſeus, Lord Ochiltree, Sir James Balfour, Martin, Dalrymple, Crawfurd, and Douglas.

Reaſon I. Preſump. 9.

JAMES III.

Buchan. 7. Between 1ſt March 1466 and May 1477, James Stewart, *Earl of Buchan.*

Home. 8. 2d Auguſt 1473, Alexander Home, *Lord Home.*

JAMES IV.

Bothwell. 9. 17th October 1488, Patrick Hepburn, Lord Hailes, *Earl Bothwell.*

JAMES V.

Methven. 10. Between 17th July 1528 and 20th September 1529, Henry Stewart, *Lord Methven.*

QUEEN MARY.

Ochiltree. 11. Lord *Ochiltree* was created 15th March 1543.

Boyd. 12. Between 1548 and 1550, Robert Boyd of Glins, *Lord Boyd.*

Marr. 13. 7th February 1561, James Stewart, *Earl of Marr.*

JAMES VI.

Buchan. 14. Between 26th December 1563 and December 1567, Robert Douglas, *Earl of Buchan.*

Lennox D. 15. 26th June 1578, Robert Stewart, *Duke of Lennox.*

Lennox E. 16. Between 18th April 1572 and 5th Auguſt 1581, Charles Stewart, *Earl of Lennox.*

Arran. 17. 22d April 1581, James Stewart, *Earl of Arran.*

Lennox D. 18. 5th Auguſt 1581, Eſme Stewart, *Duke of Lennox.*

Orkney. 19. 28th October 1581, Robert Stewart, *Earl of Orkney.*

March. 20. 25th October 1582, Robert Stewart, *Earl of March.*

This is in appearance a formidable band of *creations by Regents*; upon a nearer inſpection it will vaniſh into air.

It is all error; and indeed it ſeemed hardly poſſible to compriſe ſo many hiſtorical miſtakes within ſo narrow bounds.——This will appear from a more narrow inſpection of the particulars.

1. *BUCHAN.*

James I. "John Stewart, ſon to the Regent, Duke of Albany, was a commoner on the 12th March 1406. Charter-roll of the Duke of Albany 11th, "No 16.

" N° 16. by his father to him of that date, *filio noſtro Johanni Seneſcallo*, Reaſon 1.
" Domino de Buchan. Charter-roll 11. N° 19. from the ſame to the Preſump. 9.
" ſame, 13th May 1407, in the ſame terms. But on the 6th November
" 1413 he had been created a peer, charter-roll 12. N° 27. of that date,
" from the ſame to the ſame, *filio noſtro Johanni Seneſcalli*, Comiti
" Buchaniæ. Charter-book 11. N° 30. by James I. 25th February *an-*
" *no* 1426. *Johanni Stewart Comiti Buchaniæ.*"

ANSWER.

That a full anſwer may be made to this example, it will be neceſſary to go a little farther back than Sir Robert has gone.

John Cumin Earl of Buchan forfeited in the reign of Robert Bruce. The earldom continued with the crown till Robert II. granted it to his younger ſon Alexander. Our genealogical writers mention this grant as in the rolls of Robert II. 1374. After a diligent ſearch it cannot be found. This Alexander died in 1394. *Monumental inſcription*, publiſhed by *Crawfurd* in his Peerage, p. 47. He left no iſſue; and the queſtion is, What were the limitations in the grant of the earldom? That failing his iſſue, there was a limitation to Robert Duke of Albany, his elder brother, is probable, almoſt certain; for that in a charter immediately to be mentioned, 20th September 1406, the Duke of Albany ſtyles himſelf, " Dux Albaniæ, Comes de Menteth et *de Buchan.*" The *firſt* title he got from the crown, the *ſecond* by his wife; and it muſt be preſumed that he got the *third* by the demiſe of his brother Alexander without iſſue.

Thus the earldom of Buchan was in the Duke of Albany on the 20th September 1406, after the death of his brother Robert III. who died 29th March 1405.

On the 20th September 1406, the Duke of Albany made a grant in theſe terms: " Omnibus hanc cartam viſuris vel audituris, Robertus Dux Albaniæ,
" Comes de Menteth et de *Buchane*, ſalutem in Domino. Noveritis nos dediſſe,
" conceſſiſſe, et hac preſenti cartâ noſtrâ confirmaſſe, cariſſimo filio noſtro
" Joanni Seneſcalli, Domino de Onelle, pro homagio et ſervitio ſuo nobis im-
" penſo et impendendo, totum prædictum comitatum noſtrum de Buchane, cum
" pertinentiis ſuis, in unam integram baroniam: Tenend. et habend. prædicto
" Joanni, et hæredibus ſuis *maſculis* de corpore ſuo legitimè procreandis; qui-
" bus fortè deficientibus, Andreæ Seneſcalli fratri ſuo germano, et hæredibus
" ſuis maſculis de corpore ſuo legitimè procreandis; quibus fortè deficientibus,
" Roberto Seneſcalli fratri ſuo germano, et hæredibus ſuis maſculis de corpore
" ſuo legitimè procreandis; quibus omnibus, quod abſit, deficientibus, ad
" nos et noſtros *hæredes legitimos* liberè revertend." &c. He confirmed this grant two days after; and it is remarkable, that in his confirmation he no longer takes the ſtyle of *Comes de Buchane*. *This* is a caſe in point for confirming the claimant's propoſition, That a perſon diveſted of the *comitatus*, was no longer ſtyled *Comes*.

Robert Duke of Albany, *himſelf Earl of Buchan*, conferred the earldom on his ſon John Lord Onell and Coull. *This* did not hurt the crown; it rather advantaged it, by diminiſhing the extenſive eſtate and influence of the Duke of Albany,

Reaſon I. Preſump. 9. Albany, Earl of Menteith, Fife, and Buchan. Any map of Scotland will ſhew *what that eſtate* was; but no map can ſhew *what that influence* was, in an age, when every vaſſal was more dependent on his lord, than the meaneſt tenant at will is, at this moment, on the landholder, the moſt opulent, and removed at the greateſt diſtance from the ſeat of juſtice.

A creation in favour of John Stewart, is a mere modern idea, ariſing from the modern form of a diploma or patent of honour. In ancient times ſomething more ſolid than parchment and wax went to the creating a peer; ſomething which the Kings of Scotland could not always beſtow, a land-eſtate.

From the general and proved cuſtoms of Scotland, it may be concluded, that this charter of the *comitatus* of Buchan, was the only thing which authoriſed John Stewart to aſſume the title of *Comes*.

The limitation was to the heirs-male of his body, failing him; and in like manner, to his brothers Andrew and Robert.

This John Earl of Buchan, Conſtable of France, was ſlain at the battle of Verneuil 1424; *Mezerai*, vol. 2. p. 608. With him his brother *Robert* fell. The other brother, *Andrew*, muſt have died young; for his name is only known from the charter 1406. None of them left any male iſſue; and thus the earldom, in virtue of the limitations, devolved on the neareſt heir of the Duke of Albany, *Earl of Buchan*, the donor.

This heir was the unfortunate Murdoch Duke of Albany; whoſe weakneſs might have pleaded for him, had not his earldoms of Menteith, Fife, and Buchan, more powerfully pleaded againſt him. He was attainted, and ſuffered death in 1425; and thus the earldom of Buchan again devolved to the crown.

It has been already ſhown, that, in Scotland, peers were not always ſtyled by their full titles of honour. This will account for John Stewart being ſometimes called *Dominus de Buchan*, after he had obtained the charter of the earldom from his father. It may be accounted for ſtill better from the Duke of Albany's rolls, which Sir Robert Gordon has had occaſion to peruſe. In charter 20th July 1408, roll 11. N° 34. John Stewart is ſtyled *Dominus de Buchan*. In another charter of *the very ſame date*, he is ſtyled *Comes de Buchan*, Roll 11. N° 32. After this he is in many charters ſtyled *Dominus de Buchan:* 1409, Roll 11. N° 37. 42. 43. 45. 46. 47. and 48. In 1413, Roll 12. N° 21. and 22. he is ſtyled *Comes de Buchan*.

According to Sir Robert's argument, the fact ſtands thus. John Stewart, on the 20th July 1408, was *Earl of Buchan and Laird of Buchan*. In 1409, he was always *Laird of Buchan*. In 1413, he was again *Earl of Buchan*. How many more *tranſmigrations* he may have undergone before the death of his father, in 1420, is uncertain; the records, from the 1413, till the return of James I. being loſt. One more example ſhall be given of imperfect and careleſs appellations. It is that of Murdoch, the elder brother of John Stewart, afterwards Duke of Albany. This perſon has all the different appellations mentioned in the following catalogue.

1411. Murdacus Seneſcalli, Miles. *Rymer*, t. 8. p. 708.

1413. Mordan Stewart Magiſter de Fyfe. *Rymer*, t. 9. p. 48.

1414. Mordacus de Fyfe, Miles. *Rymer*, t. 9. p. 125.

1415. Murchowe de Fyfe, filius et hæres Ducis Albaniæ. *Rymer*, t. 9. p. 244.

1415.

1415. Comes de Fyfe. *Rymer*, t. 9. p. 280. Reaſon I. Preſump. 9.
1415. Mordacus filius Ducis Albaniæ. *Rymer*, t. 9. p. 323.
1416. Mordacus de Fyfe. *Rymer*, t. 9. p. 405.

Sir Robert Gordon refers to a charter 25th February 1425-6, for proving that James I. gave the title of Earl of Buchan to John Stewart. It would have been of no conſequence although he had; but the truth is, that the charter implies no ſuch thing. About 1413, John Stewart married Eliſabeth, the daughter of Archibald Earl of Douglas. He obtained charters of certain lands from the Duke of Albany and from the Earl of Douglas, deviſed to him, his wife, and their heirs. Theſe charters were confirmed by James I. in 1425-6, after the death of the Earl of Buchan. As he was ſtyled *Earl of Buchan* in the *charters confirmed*, he was of neceſſity ſtyled *Earl of Buchan* in the charters *confirming*. The charters bear no relation to the *earldom of Buchan*; and indeed it is ſomewhat ſingular to ſpeak of a charter granted to a man two years after his death.

What has been ſaid, will, it is apprehended, afford a ſatisfactory anſwer to the *firſt* example of creations by regents.

2. CATHCART. James II.

"Sir Allan Cathcart was created *Lord Cathcart* 1442. Niſbet, vol. 1. "p. 246."

ANSWER.

1. Niſbet quoting no authority, is himſelf no authority.

2. Niſbet does not ſay, that "Sir Allan Cathcart was created *Lord Cathcart* "in 1442:" his words are, "He was dignified with the honour of Lord Cath-"cart by King James II. in 1447." Douglas, in his Peerage, title *Cathcart*, quotes Niſbet, to prove that the year of this creation was 1442. Sir Robert's counſel, without conſulting even Niſbet, has relied on Douglas's typographical error. A ſtrange ſpecimen of inattention!

3. In 1447, James II. reigned in perſon; for that the record of parliament 1443 runs thus: "Concilium generale tentum et inchoatum apud Strivilen, "per Excellentiſſimum Principem ac Dominum noſtrum Regem Jacobum Secun-"dum, *in ſua perſona propria præſiden. die 4to menſis Novembris, an. Dom.* "1443."

4. It is odd to talk of *creations by Regents* in the reign of James II. for that there was no regent during that reign.

Reaſon I. Preſump. 9.

James II.

3. *HUNTLY.*

" Alexander Seaton of Tillibothy was a commoner 13th May 1440. " Evidence, book 3. N° 176.; but betwixt this period and the 1449, " he was created Earl of Huntly. Charter, b. 4. N° 106."

ANSWER.

1. This is another example of a *creation by a regent* when no regent exiſted.

2. James II. was fully poſſeſſed of the government long before 1449. Sir Robert's favourite hiſtorian Ferrerius places this creation in 1446; but *his* authority is nothing. Others, as Crawfurd and Douglas, place it in 1449. When the parliamentary record 1443 is conſidered, it matters not whether the creation was in the one year or in the other.

James II.

4. *ABERNETHY.*

" Laurence Abernethy of Salton was created *Lord Abernethy* of Sal- " ton by James II. an. 1445. *Fordun*, vol. 2. p. 542."

ANSWER.

1. Even the Continuator of Fordun goes no farther down than to the death of James I. What is here quoted, is neither from Fordun nor Bower; but from an imperfect ſcrap of a chronicle, in proſe and verſe, tranſcribed by one Robert Scot in 1510, and ſubjoined to the laſt edition of Fordun. It contains a memorandum in theſe words: " Anno 1445, erecti ſunt Domini de Creichton, " *Abernethy*, Glamis, Seton, Leſly de Levin, Hamilton, Lindeſay de Byris, " Gray de Foulis." It will not be ſeriouſly aſſerted, that this liſt is genuine. Douglas ignorantly or inadvertently quoted it, title, *Abernethy of Salton*; and from him it has been tranſcribed to make bulk.

2. As James II. reigned in perſon from 1443, and as there was no regent in 1445, the example, were it vouched, would be nothing to the purpoſe.

James II.

5. *CRICHTON.*

" William Crichton was a commoner 27th April 1442, Charter, " b. 3. N° 171.; but he was created a peer before 7th April 1450, Char- " ter, b. 4. N° 15. by James II. Willielmo Domino Crichton, noſtro " Cancellario."

AN-

ANSWER. Reaſon I. Preſump. 9.

That Chancellor Crichton was a Lord of parliament in April 1450, proves nothing; for that James II. had aſſumed the government *ſeven* years before.

6. *MONEYPENNY.* James II.

"Moneypenny Lord Moneypenny. This peerage was created *about* "1450. Crawfurd's Peerage, p. 345."

ANSWER.

1. The ſame anſwer is applicable to this caſe, as to the others in the reign of James II.

2. Crawfurd's words are wide of Sir Robert's purpoſe. They run thus: "He was raiſed to the honour of Lord Monypenny, May 1. 1450, *Ch. in publ. arch.*; whereby ſeveral lands are erected into the barony, in favour of this Sir "William; *after which he is always deſigned in the records*, Willielmus Do-"minus Monypenny." Sir Robert Gordon may make the moſt that he can of this example.

7. *BUCHAN.* James III.

"James Stewart, brother to King James II. was a commoner on the "1ſt March 1466, Charter, b. 7. N° 114.; but before May 1477, he "had been created a peer, b. 8. N° 35."

ANSWER.

James III. was born in 1453. This wonderful example proves James Stewart to have been a commoner when the King was thirteen years old, and *to have been a peer when the King was twenty-four years old.*

8. *HOME.* James III.

"On the 2d Auguſt 1473, Alexander *Laird of Home* was created a "Lord of Parliament, by the title of *Lord Home*. Record of parliament, "b. 11. fol. 96."

AN-

Reaſon I. Preſump. 9.

ANSWER.

At that time there was *no* Regent. James III. had aſſumed the adminiſtration in July 1466, *ſeven* years before Lord Home became a Lord of Parliament. See *Buchanan*, lib. 12. p. 226. It will be remarked, in paſſing, that the expreſſion, *Laird of Home*, is a tranſlation adapted to an hypotheſis. The record bears, "Mem. quod 2do die Auguſti, in præſentia parliamenti, Dominus Alex-"ander Home, de Eodem, Miles, effectus fuit Dominus Parliamenti." This memorandum, literally tranſlated, runs thus: "Be it remembered, that on the "2d of Auguſt, in the preſence of parliament, the Lord Sir Alexander Home "of Home (*p*) was made a Lord of Parliament." The contemptible title of *Laird*, beſtowed, in modern language, even on the loweſt heritor holding of a ſubject, is wide of the meaning of the record.

James IV.

9. *BOTHWELL.*

"Earl Bothwell was created in parliament 17th October 1488. Crea-"tion, b. 4. N° 93."

ANSWER.

At that time James IV. though not fully ſixteen years old, had the adminiſtration of affairs; every thing was conducted in his name. *Buchanan*, lib. 13. p. 240. There was ſurely *no Regent* in October 1488, unleſs the whole parliament and community of Scotland were to be conſidered as *Regents*.

James V.

10. *METHVEN.*

"Henry Stewart was a commoner on the 17th July 1528, Charter, "b. 22. N° 126.; but he was created a peer before the 20th September "1529, Charter, b. 23. N° 78."

ANSWER.

This example is as foreign from the purpoſe as any of the others; for that James V. aſſumed the adminiſtration in 1526, *three* years before this creation. *Buchanan*, lib. 14. p. 265. and *Ruddiman's notes*.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*p*) The modern word *Knight* does not convey the idea of *Miles*.

11.

Reaſon I.
Preſump. 9.

11. *OCHILTREE.* Q. Mary.

"Lord Ochiltree was *created* in parliament on the 15th March 1543.
"Record of parliament, b. 10. fol. 76."

ANSWER.

It was wrong to quote this example as a *creation* by a Regent. There was no creation at all, only an act of parliament, approving a change of title. Andrew, 3d Lord Avondale, had exchanged his lordſhip of Avondale with Sir James Hamilton, for the lordſhip of Ochiltree. In 1534, under the title of *Dominus Avondale*, he obtained a charter from James V. confirming the exchange. Being thus diveſted of the old eſtate, he quitted the old title, and aſſumed that of *Ochiltree*. In 1538 and 1542, he obtained royal charters, under the title of *Dominus Ochiltree*; and on the 13th March 1543, two days before the confirmation by parliament, he is marked on the roll as *Lord Ochiltree*. This inſtance, therefore, may ſerve to prove, that, ſo late as 1543, the idea of *title* was intimately connected with *territory*; but it can prove no more.

12. *BOYD.* Q. Mary.

"Robert Boyd of Glins, in the fifth year of Queen Mary's reign,
"[1548], was a commoner. Charter of that date, *Roberto Boyd.* In
"the intermediate time betwixt that and the 7th year of the Queen's
"reign, [1550], he had been created *Lord Boyd*. Charter of that
"date, by Queen Mary, mentioning *Robertum Magiſtrum de Boyd.*"

ANSWER.

This alſo is all error.—— Robert Boyd, ſon of Lord Boyd, married the heireſs of Colquhoun of Glins: hence he was called, in 1548, *Robert Boyd of Glins*. This ſurely does not imply, that his father was a commoner. Robert Boyd of Glins muſt needs have been a commoner in 1548: for his father was alive in 1549. The Robert Maſter of Boyd, in Queen Mary's charter 1550, was, in all probability, not Robert Boyd of Glins, but his ſon.

13. *MARR.* Q. Mary.

"James Stewart, afterwards Regent, was created Earl of Marr on the
"7th February 1561. Privy-ſeal records, b. 31. fol. 2."

Reaſon I. Preſump. 9.

A N S W E R.

Queen Mary arrived in Scotland 19th Auguſt 1561. At that time ſhe reigned in her own name. See all our hiſtorians, and eſpecially *Robertſon*. In February following, 1561-2, ſhe beſtowed the earldom of Marr on the Prior of St Andrew's: and yet *this* is given as an example of *creations by Regents*.

James VI.

14. *B U C H A N.*

" Robert Douglas, brother-uterine to the Regent James Earl of Mo-
" ray, was a commoner in 1563, Precept of appriſing, Privy-ſeal
" records, b. 22. fol. 44.; but before December 1567, he ſat in the
" Scots parliament as Earl of Buchan, Anderſon, vol. 2. p. 268." It is elſewhere expreſsly averred, " That he got a patent from his *uncle*,
" [brother-uterine], Regent Moray." *Supplemental Caſe*, p. 32.

A N S W E R.

The claimant has averred, from evidence and analogy, that Robert Douglas was Earl of Buchan in right of his wife Chriſtian Counteſs of Buchan. Sir Robert Gordon avers, that he was created by Regent Moray, not only without evidence, but contrary to evidence.

1. Sir Robert's argument proves the Earl of Buchan to have ſat in parliament 15th December 1567. And it ſhall here be *ſuppoſed*, though not *granted*, that it proves him to have been a commoner on the 26th December 1563. But ſurely this does not prove, what was neceſſary for Sir Robert's argument, that he continued a commoner from 26th December 1563 to 24th July 1567, when Queen Mary reſigned the adminiſtration of government.

2. It is perfectly clear, that the Earl of Buchan was *not* created by Regent Moray. We know from the ſtatute-book, that on the 24th July 1567, Queen Mary reſigned the adminiſtration of government, and appointed the Earl of Moray Regent. Moray at that period was abſent from Scotland, and did not accept of her nomination till 22d Auguſt 1567; *Anderſon*, vol. 2. p. 251. His title was not ratified in parliament till the 25th December 1567; *Statute-book*. The Earl of Buchan was one of the Lords who ratified it.

Nevertheleſs Sir Robert Gordon, with the ſtatute-book lying open before him, aſſerts, that the Earl of Buchan was created a peer by Regent Moray, by that very perſon whoſe authority he contributed to ratify. With more propriety it might have been ſaid, that the Earl of Buchan made Moray Regent, than that Moray made him a peer. This has been already mentioned in a former part of the claimant's caſe; but it was thought better to repeat it, than to interrupt the argument by referring back to that paſſage.

15. *LEN-*

Reaſon I. Preſump. 9.

15. *LENNOX.* James VI.

" Robert Stewart was created Earl of Lennox, by a creation in a " royal charter, 26th June 1578, b. 35. N° 8."

ANSWER.

This proves nothing in favour of creations by Regents. On the 12th March 1577-8, the Earl of Morton reſigned the office of Regent. In conſequence of this event, James VI. aſſumed the government. Captain James Stewart, his favourite, beſet the throne with *Stewarts:* offices of truſt, and titles of honour, were ſucceſſively beſtowed on every branch of that ſtock, illegitimate as well as legitimate. It is true, that Captain James Stewart reigned; but ſtill the government was in the King's name. This appears from the unprinted acts of parliament, 25th July 1578; where, ch. 2. is intitled, " Ratification of the re- " giment *be the King's Majeſtie in his own perſon.*"

By it the demiſſion of Regent Morton, and the King's *acceptation* of the government in March preceding, are ratified. The ſtatute " finds and declares, " That the adminiſtration of his Hienes realm, government and authority there- " of, *is in his Hienes own hands.*"

2. Indeed the very firſt words of the charter of creation itſelf confute Sir Robert's hypotheſis. They run thus: " Sciatis, quia nunc *poſt acceptationem re-* " *giminis in noſtris propriis manibus.*"

16. *LENNOX.* James VI.

" Charles Stewart, uncle to King James VI. was a commoner on the " 18th April 1572; Charter, b. 33. N° 107, to him, in which he is " ſeveral times deſigned, *Patruus noſter Dominus Carolus Stewart:* " but, from the conſtitution of the dukedom of Lennox, it appears, " that he had been created Earl ſome time between that period and the " year 1581; *Evidence*, Conſtitution of the dukedom of Lennox, 5th " Auguſt 1581."

ANSWER.

The claimant might take this example as ſhe finds it, and anſwer, That as James VI. aſſumed the government in 1578, a creation before 1581 would prove nothing; for that it might have been by the King himſelf in 1578, 1579, 1580, or 1581. But as the claimant wiſhes rather to aſcertain an hiſtorical fact, than to ſilence an adverſary, ſhe will obſerve, that if Charles Stewart was created

Reaſon I. Preſump. 9. ted Earl at all, it muſt have been much earlier than 1581; for that he died in 1576. In 1571, the earldom of Lennox devolved on James VI. by the death of his grandfather, Matthew Earl of Lennox. During the King's nonage, a charter of the earldom was granted to Charles Stewart, his uncle; but the King *revoked that charter, becauſe granted during his nonage*; *Record charters*, b. 35. N° 8. 16th June 1578. It is believed, that Sir Robert Gordon will not derive much benefit from *this* example.

James VI. 17. *ARRAN.* 18. *LENNOX.* 19. *ORKNEY.* 20. *MARCH.*

The obſervation already made, "That James VI. having aſſumed the govern-"ment, upon the demiſſion of Regent Morton, 12th March 1577-8," affords a full and ſatisfactory anſwer to the examples of the Duke of Lennox, and Earls of Arran and Orkney, created in 1581, and of the Earl of March, created in 1582; and therefore nothing ſhall be ſaid of the 17th, 18th, 19th, and 20th inſtances of creations by Regents.

After taking a ſurvey of the *twenty examples of creations by Regents*, the claimant preſumes, that her propoſition, "That there is no evidence of any "ſuch creation," ſtill remains unconfuted. It is difficult to ſay upon what principles Sir Robert Gordon compoſed his catalogue. One thing is plain, that he has laid it down as an axiom in the hiſtory of Scotland, "That a Regent al-"ways officiated until the King attained the age of twenty-five years com-"plete;" than which a more extraordinary hiſtorical hypotheſis cannot be deviſed.

Notwithſtanding all that has been urged to the contrary, let it be ſuppoſed, for argument's ſake, that either Earl John or Alexander reſigned the earldom to Adam Gordon; or let it be ſuppoſed, that Alexander forfeited, and that Adam Gordon obtained a new creation from a Regent; there ſtill remains a difficulty which Sir Robert Gordon ought to have ſolved, and yet has not attempted to ſolve.

Why did Adam Gordon obtain a creation limited to the *heirs-male of his body*, and not to *the heirs-general?*

Here it muſt be taken for granted, that the Earl of Huntly was all-powerful with the Regent; and that the Regent was deſirous, at any rate, of conciliating the favour of the houſe of Gordon.

In ſuch circumſtances, if a reſignation could be preſumed, it would be a reſignation to Adam Gordon, and to his heirs-general by Eliſabeth his wife. *This* would have introduced Adam into the peerage, without changing the line of ſucceſſion.

In like manner, if a creation could be preſumed, it would be a creation of Adam Gordon, and his heirs-general by Eliſabeth.

The reaſon is obvious: As the inveſtitures then ſtood, the whole eſtate of the earldom of Sutherland muſt have paſſed to the *heirs-general* of Adam and Eliſabeth, in like manner as it had recently paſſed to Eliſabeth, the *heir-general* of her brother.

Suppoſing

Reaſon I. Preſump. 9.

Suppoſing then that Alexander the ſon of Adam and Eliſabeth had died, leaving iſſue a daughter, and that Adam had had a ſon by a ſecond marriage, the daughter of his eldeſt ſon would have inherited the whole eſtate of Sutherland, while his ſecond ſon would, according to Sir Robert Gordon's hypotheſis, have born the empty title of *Earl of Sutherland.*

Adam Gordon is repreſented by Sir Robert, as a crafty man, and of unbounded ambition. Would ſuch a man have been ambitious of an inſtrument of creation ſo limited? or would he have conſented, as he certainly did, to that deed of Eliſabeth, whereby ſhe put her ſon, and his *heirs-general*, in the fee of the whole eſtates of Sutherland?

Theſe are queſtions which merit an anſwer. Hitherto they have received none, unleſs this ſhould be held as an anſwer, That *hæredes ſui* implied *heirs-male*; or, in other words, that while the *hæres ſuus* of Earl John was a female, Eliſabeth, the *hæres ſuus* of Eliſabeth muſt have been a male, deſcended of males.

SECOND REASON for Sir ROBERT GORDON.

p. 22. "The principle wherein the claimant founds himſelf is ſupported by "clear authorities, being that which governed the ſolemn determina- "tion in the two caſes of the Earl of Caſſilis and Lord Borthwick; the "ſame which had before regulated thoſe of the court of ſeſſion in the "caſe of Lovat, and in the queſtion about precedency between the Earls "of Crawfurd and Sutherland in this peerage; and that which directed "the lawyers of the crown, in the caſe of an heir-male of the family of "Mordington, who was indicted for high treaſon at Carliſle in 1746, "and pleaded privilege of peerage."

ANSWER.

It has been already ſhewn, that the caſes of Caſſilis, Borthwick, and Lovat, do not contradict the principles laid down by the heir-general claiming the honours of Sutherland; and that they are not applicable to the circumſtances of her caſe.

As to the queſtion concerning precedency agitated between the Earls of Sutherland and Crawfurd, it was fairly ſtated in the claimant's original caſe; and, to ſave trouble to the reader, ſhall be re-ſtated here.

In the queſtion concerning precedency between the Earls of Sutherland and Crawfurd, the court of ſeſſion, on the 25th January 1706, "*Found the documents produced ſufficient to inſtruct the propinquity of blood, and deſcent of the dignity, from* William Earl of Sutherland, *brother-in-law to* King David Bruce, *to* John Earl *of* Sutherland, *ſerved heir to his father Earl* John, *anno* 1512; *and found it not inſtructed by the documents produced*, that the dignity of *John* Earl of *Sutherland* was conveyed to *Eliſabeth* his ſiſter, ſerved heir to him in the eſtate, in the year 1514."

Reaſon II. In this queſtion the counſel on either ſide argued the cauſe with more warmth than preciſion; in particular, the counſel for the Earl of *Crawfurd* laid down certain *principles*, as founded *in facts*, which a more accurate inquiry into hiſtory and records has evinced to be *abſolutely and inconteſtably erroneous*.

They aſſerted, 1. That according to the conſtruction of the law in 1347, *heirs of the marriage*, in reſpect to the dignity and juriſdiction, can only be underſtood of *heirs-male* (*q*).

2. That if the fee was provided (in 1455) *hæredibus* ſimply, and not *hæredibus quibuſcunque*, then *heirs-male* only were underſtood (*r*).

3. That heirs-female were excluded from the ſucceſſion of dignities with juriſdictions (*s*).

4. That no inſtance can be produced, and clearly inſtructed (authenticated), where ancient titles of dignity have fallen with the eſtate to heirs-female (*t*).

5. That if this ever happened, it was by a reſignation; and in particular they ſaid, that it cannot be inſtanced, that about that time (1514), and ſo far backward, ever any heireſs did carry with her the dignity; but that afterwards, whether ſhe came to marry, or was before married, it gave occaſion to a new creation (*u*).

6. That *Adam Gordon* was deſigned, and called, *Earl of Sutherland*, which could never be but by a new creation; and that his being called *Earl* from an abuſe, becauſe married to a Counteſs, was ſuch an abuſe in titles of honour as never was admitted (*x*).

7. That if Adam Gordon was Earl by a new creation, *no man can doubt but the title was conferred upon him and his heirs-male* (*y*).

8. That as the Earls of Sutherland quitted their ancient name, and took Adam's name of Gordon, *it is a demonſtration*, that they held and derived their title and dignity from him, as the firſt Earl (*z*).

Theſe

PROOFS, AUTOHRITIES, and ILLUSTRATIONS.

(*q*) Printed Memorial for the Earl of Crawfurd, p. 68.

(*r*) Ditto, p. 70.

(*s*) Ditto, p. 69.

(*t*) Ditto, p. 69.

(*u*) Ditto, p. 68.

(*x*) Ditto, p. 76.

(*y*) Ditto, p. 72.

(*z*) Ditto, p. 72. This argument, from the change of name, appears to have been abandoned by Sir Robert Gordon himſelf as untenible. And indeed it was exceedingly ridiculous, that perſons pretending to be antiquaries ſhould have gravely argued upon that circumſtance as *ſingular*, which conſtantly occurred.

Of this aſſertion, which is ſo evident, and ſo univerſally known, there cannot be a ſtronger example than in the family of Huntly itſelf; whereof Adam Gordon was a ſon.

Eliſabeth

Theſe *eight* propoſitions may ſerve as a ſpecimen of the manner in which the counſel for the Earl of Crawfurd thought fit to argue their cauſe. Reaſon II.

The propoſitions are repreſented as *certain*, as *undeniable*, nay, even as *demonſtrative*; and yet they are all fundamentally erroneous, inconſiſtent with probability, and the faith of hiſtory and records.

The circumſtances attending this firſt interlocutor are ſingular: There were fifteen judges preſent; five concurred in the interlocutor, two were againſt it, the reſt did not vote. This circumſtance is mentioned by Lord Fountainhall, (himſelf one of the judges at that time). He indeed ſays, five or ſix were *non liquet*, (did not vote); but it is plain, that ſeven did not vote, without including the preſident; who never votes, unleſs in the caſe of an equality of voices (*a*).

It is alſo to be obſerved, that the court did not expreſsly find, that the dignity was not conveyed to *Eliſabeth*; but only that this *was not inſtructed from the documents produced* (*b*).

By this it appears, that they not only allowed to Lord Sutherland the common privilege of applying for a review of the interlocutor, but they alſo pointed out in what particular it was that they required more ſatisfactory information.

And by omitting the technical word *decern*, they prevented this interlocutor from becoming a decree of the court. The words "and decern," are the words which authoriſe the *extracting of a decree*. Hence, if Lord Crawfurd had propoſed to have the cauſe put out of court, he muſt have applied of new for the interpoſition of the judges, in order to authoriſe an extract.

Lord Sutherland put in his reclaming petition againſt the interlocutor above mentioned.

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

Eliſabeth Gordon, the heireſs of Gordon, married Alexander Seton, ſon of Sir William Seton; *Record* Charters, Roll 11. N° 32. Her ſon is in 1421 called *Alexander de Seton, Dominus* de Gordon; *Rymer*, t. 10. p. 127. 154. 174. 266. 309. 677. 702. &c. &c. He obtained a charter of lands from the crown in 1439, under the deſcription of "*Alexander de Seton, filius et hæres Eliſabethæ de Gordon de Eodem;*" *Record* Charters, b. 3. N° 176. It was not till 1449 that the family reſumed the ſurname of Gordon. This Alexander was the grandfather of Adam Gordon, the huſband of Counteſs Eliſabeth.

From a like cauſe, the ſurname of the Earl of Angus became *Douglas* inſtead of *Stewart*; of the Earl of Marr, *Douglas* inſtead of *Marr*, and *Ereſkine* inſtead of *Douglas*; of the Earl of Strathern, *Graham* inſtead of *Stewart*; of the Earl of Buchan, *Douglas* inſtead of *Stewart*; and ſo late as 1617, *Ereſkine* inſtead of *Douglas*.

(*a*) Lord Fountainhall's words are, "There were five of the Lords clear in this laſt "point, two voted againſt it, and five or ſix were *non liquet*, Whether the eſtate devol- "ving on Eliſabeth, made the dignity ceaſe and expire, ſo that it began, as it were, a new "family, having no claim to the precedency of the former Earls of Sutherland." *Fount. Deciſions*, vol. 2. p. 320.

(*b*) Among the many miſtakes committed by Mr Forbes in his Collection of the Deciſions of the Court of Seſſion, it is not one of the leaſt, that, in reporting this caſe, he ſays, that the court found, "That the dignity was not conveyed from John Earl of Su- "therland, who ſucceeded in the year 1512, with the eſtate, to his ſiſter *Eliſabeth*."

This

Reaſon II. This petition he introduced with theſe remarkable expreſſions. "Your Lord-"ſhips will remember, that, before pronouncing the interlocutor, ſeveral of "your number deſired to be cleared; and that there were *but only a third part* "*of the Lords* who gave their opinion in the terms of the interlocutor: and "therefore, that the point may be in full light, both for ſatisfying ſuch of your "Lordſhips as did not find it inſtructed, that Eliſabeth had the dignity conveyed "as well as the eſtate, and alſo for clearing the queſtion to the whole Lords, I "beg leave, by way of petition, to inform as to that point only (*c*)."

If the facts here ſet forth had not been conſiſtent with the knowledge of every one of the fifteen judges, it is not to be ſuppoſed that her Majeſty's Advocate, who drew up the petition, would have thus averred them in open court.

In this petition the cauſe of Lord Sutherland was diſengaged from much of the rubbiſh of the former informations, the old materials were arranged in more regular form, and new materials were employed.

The Earl of Crawfurd alſo petitioned againſt that part of the interlocutor which over-ruled his plea of preſcription.

The court appointed each party to put in anſwers to the petition of the other.

Anſwers were accordingly put in for the Earl of Sutherland, but no anſwers were put in for the Earl of Crawfurd.

The union of the two kingdoms ſoon after took place; and from that time the authority under which the court of ſeſſion had entered into the diſcuſſion of this queſtion ceaſed.

As to the caſe of *Mordington* in 1746, it is natural for every one to wiſh to have in his favour the opinion of the great names in the law who were intruſted by the public at that period.

But this very reaſon ought to have made Sir Robert Gordon more cautious in his averments.

The caſe of Mordington was this. Charles Douglas was indicted as a commoner for treaſon; he pleaded privilege as Lord Mordington; he proved his deſcent; and his plea was either allowed, or ſuppoſed to be good. His deſcent was as heir-male, *in the direct line of ſucceſſion*, from the perſon firſt ennobled. What relation this caſe can have with any of Sir Robert's numerous principles, is beyond all comprehenſion!

PROOFS, AUTHORITIES, and ILLUSTRATIONS.

(*c*) Petition for the Earl of Sutherland, printed, p. 1.

CHAP. VII.

CHAP. VII.

No presumption for the creation of Adam Gordon can arise from the circumstance of his assuming the title of *Earl of Sutherland.*

THE claimant, in the course of her argument, had urged, That Adam Gordon assumed the title of Earl of Sutherland, by courtesy only, in right of his wife, which was customary in Scotland; and hence, in a charter 1st December 1527, to Alexander Gordon, son of Adam and Elisabeth, the liferent is reserved, "dictis Elisabeth Comitissæ de Sutherland, et Adæ Gor-"don, sponsi sui, ratione curialitatis Scotiæ, et eorum alteri diutius "viventi, pro toto tempore vitæ suæ."

Sir Robert Gordon, after proving that Adam Gordon assumed the title of *Earl of Sutherland*, concludes, That Adam Gordon was Earl of Sutherland in his own right; and at the same time he produces many ingenious and subtile arguments to prove, that he could not take the title by courtesy.

It was unnecessary to prove, that Adam Gordon assumed the title of *Earl*; for it is what the claimant not only admits, but urges as evidence of the connection, in ancient times, between the possession of an *earldom*, and the title of *Earl*.

It is certain, and the claimant repeats it, "That in ancient "times the husband of a peeress in her own right generally assu-"med the title of honour; and that it was allowed him by cour-"tesy."

Sir Robert Gordon is aware, that this proposition, if established, would overturn his argument; and therefore he has laboured to shew, that no such practice prevailed in Scotland.

The claimant will state the examples, Sir Robert's Objections, and her Answers.

Much of this argument has been already anticipated in chapter 5. *concerning the deſcent of titles of honour to heirs-general*; and therefore the examples, objections, and anſwers, will be ſtated with the more brevity.

The following perſons appear to have aſſumed titles of honour in right of their wives.

Angus. Before 1242. John Cumin, huſband of Matildis Counteſs of Angus. "Obiit "Johannes Comes de Angus in Francia," *Chr. de Melros*, ad. an. 1242. From *Ch. Aberbr.* vol. 1. fol. 52. 53. 75. the names of the Earls of Angus, father, grandfather, and great-grandfather, of Matildis, are known. The perſon who died in France muſt have been the brother, the ſon, or the huſband, of Counteſs Matildis. He could not have been her *brother*; for that the name of *Cumin* had not been eſtabliſhed in Scotland during *four* generations: nor her *ſon*; for then her ſon, by a ſecond marriage with a ſtranger, could not have been Earl of Angus. John Cumin therefore muſt have been her *husband*.

Counteſs Matildis next year married Gilbert de Umfraville. *Chr. Melros*, ad an. 1243. He died 1245, *Dugdale*, Baronage, tit. 2. p. 505. By reaſon of his early death, his name does not appear in the Scottiſh hiſtory. The *ſon* of Counteſs Matildis, Gilbert Earl of Angus, *Rymer*, tit. 2. p. 266. was, in the claimant's former Caſe, erroneouſly ſuppoſed to have been her *husband*. The ſameneſs of the names occaſioned the miſtake. The paſſage in the accurate Dugdale has corrected it.

OBJECTION.

Part of Sir Robert Gordon's objection is founded upon the evidence, that Gilbert de Umfraville, the ſecond huſband, bore the title of *Earl of Angus*. As this was an error in the claimant's Caſe, there is no occaſion to examine the objection.

p. 32. 34. With reſpect to John Cumin, the firſt huſband, Sir Robert ſuppoſes, that the peerage had failed in Matilda, and been revived in him: *A thing*, as Sir Robert ſays, *exceedingly common in Scotland when the peerage ſunk in a female*.

A N-

ANSWER.

Of this *thing so exceedingly common*, Sir Robert has not produced, nor can produce, one single example while peerages continued territorial: and it has been shewn, that John Cumin could not have been created Earl of Angus; for that if the title did not belong to his wife, as *heir-general*, it belonged to a collateral descendent of the family of Angus, as *heir-male*.

Thomas de Gallovidia, husband of Isabel Countess of Athole; *Sir James Dalrymple*, p. 379.; *Charters*, Advocates library, N° 60.; *Fordun*, lib. 9. c. 48.; *Ch. Dunfermline*. The examples marked with an asterisk were not in the original Case; the objections to them are not known. *Athole. Ante 1331.

David de Hastings, husband of Fernelith, aunt and heir of Patrick Earl of Athole, "accepit ejus comitatum provenientem sibi ex "parte uxoris." *Chr. Melros*, ad an. 1242. Athole. 1242.

OBJECTION.

p. 34. "By *comitatus* the Chronicle of Melros means *land-estate*; in consequence of which, the crown, as in *fifty other instances*, conferred the peerage on David Hastings."

ANSWER.

Comitatus for a land-estate, unconnected with the title of *Comes*, was not the language of those days. None of the *fifty instances* can be produced.

John de Strathbolgie, the husband of Adda Countess of Athole, *Confirmation* by Johannes Comes Atholiæ, et "Adda Comitissa," to the abbacy of Coupar. *Sir James Balfour's* MS. collections. *Rymer*, T. 2. p. 266. an. 1283. Athole. 1269.

OBJECTION.

p. 34. "There is no proof *who* was the wife of John de Strathbogie, nor "how he became Earl."

AN-

ANSWER.

The proof that his wife was the daughter of David Earl of Athole, is to be found in the confirmation of the grant which "David Comes Atholiæ, *pater* "*Addæ Comitiſſæ*," made to the abbacy of Coupar. Ferneleth was Counteſs of Athole; and ſo alſo muſt her daughter have been.

* Menteth. Ante 1258. Walter Cumin, the huſband of N—— Counteſs of Menteth. *Chr. Melros, ad. an.* 1258. *Fordun, lib.* 10. *c.* 11. 37.

* Menteth. 1258. Walter Stewart, the huſband of N—— Counteſs of Menteth. *Fordun*, ibid. *Ch. Paiſley*, fol. 73. *Rymer*, t. 2. p. 266. 471. 552. 644.

* Fyfe. Ante 1359. Sir William Ramſay, the huſband of Iſabel Counteſs of Fyfe. *Original Charter*, David II. 20th Auguſt, an. reg. 29. i. e. 1359. *Sibbald*, Hiſtory of Fyfe, p. 97.

The claimant can ſay nothing as to Thomas Biſſet, the ſecond huſband of Iſabel Counteſs of Fyfe, becauſe his name never appears, either on record, or in hiſtory, after the grant of the *comitatus* made to him by David II. upon the extorted reſignation of Iſabel; and had his name appeared after that grant, it muſt have been as *Earl of Fyfe* in his own right.

Carrick. 1270. Robert Bruce, the huſband of Margaret Counteſs of Carrick. *Fordun*, lib. 10. c. 29. lib. 11. c. 13. *A. Winton*, MS Chronicle, Advocates library. *Rymer*, t. 2. p. 266.

OBJECTION.

p. 35. Sir Robert contends, "That by *comitatus*, Fordun only meant the "land-eſtate; and that the peerage was in the perſon of the huſband "himſelf."

ANSWER.

This is confuted, at great length, in chapter 5. *concerning the deſcent of titles of honour to heirs-general*, and ſhall not be here reſumed. Upon the ſtricteſt ſcrutiny, the example will be found good.

Robert

Robert Stewart, ſecond ſon of Robert II. married Margaret heireſs of the earldom of Menteth, and in conſequence of this marriage bore the title of *Earl of Menteth*. *Sir James Dalrymple*'s Collections, p. 392. 393. *Lives of the Officers of State*, p. 301. Menteth. Ante 1371.

OBJECTION.

p. 34. "The authority quoted is that of *Sir James Dalrymple*, which makes "directly againſt the Lady Eliſabeth. The words are, p. 393. "It ſeems, "by marriage with Earl Murdach's daughter, the earldom came to "Robert Stewart, ſecond ſon of King Robert, who was deſigned *Cuſtos* "*comitatûs* before he was deſigned *Comes de Menteth*." The paſſage "proves two things: *firſt*, That after the huſband had got the earldom, "that is, the land-eſtate, he was called only *Cuſtos comitatûs*; and, "2dly, That he was not till afterwards deſigned *Comes de Menteth*, "which muſt have been upon creation."

ANSWER.

Sir James Dalrymple is a reſpectable authority. He was a learned perſon; of no genius indeed, but of great reading and integrity. Imagining that every antiquary underſtood the import of the phraſe *cuſtos comitatûs*, he has not explained it. When *it* is once *underſtood*, Sir Robert's objection vaniſhes.

Whenever a perſon having right to an earldom was, by nonage, or other incapacity, unfit to act, the Sovereign appointed a *cuſtos comitatûs*. Thus *Fordun* ſays, lib. 10. c. 28. an. 1270, "Obiit Colbanus Comes de Fyfe, cujus *comita*-"*tus commendatus eſt* Alexandro filio Regis, *donec filius* Colbani, verus hæres, "puer octo annorum, *legitimæ ſit ætatis*."

The like cuſtom prevailed in England, as far back as the reign of the Conqueror: "Capto poſtmodum Walthevo, *commiſſa eſt cura comitatûs* Walchero E-"piſcopo." *Leland, Collectanea*, vol. 1. p. 126. *R. Hoveden*, p. 457. edit. Francof. 1601.

The form of the writ as it ſtood in the reign of Edward I. is preſerved in *Rymer*, t. 2. p. 793. and runs thus: "Rex, &c. Epiſcopis, abbatibus, prioribus, "comitibus, baronibus, militibus, vicecomitibus, et omnibus aliis balivis et "fidelibus ſuis, per totam terram noſtram Galwediæ, et comitatum de Are, "conſtitutis, ſalutem.

"Sciatis, quod conſtituimus dilectum et fidelem noſtrum Johannem de Hodleſ-"ton, *cuſtodem* caſtrorum noſtrorum de Are, Wiggeton, Cruggleton, et Bo-"tel, ac totius terræ prædictæ, necnon et *comitatûs prædicti*, quamdiu nobis "placuerit.

"Ita quod vicecomites in quorum balivis caſtra prædicta exiſtunt, de exiti-"bus caſtrorum eorundem et vicecomitatuum ſuorum tenerentur, et inde nobis "reſpondeant ad ſcaccarium noſtrum apud Berwycum.

" Et ideo vobis mandamus, quod eidem Johanni, tanquam *cuſtodi noſtro* " prædictorum caſtrorum, terræ, et *comitatûs*, in omnibus, quæ ad cuſtodiam " illam pertinent, intendentes ſitis et reſpondentes, ſicut prædictum eſt. In " cujus, &c. teſte Edwardo filio Regis, apud Tunbrigg, 28vo die Auguſti " [1297]."

It is irkſome to produce evidence in ſupport of hiſtorical facts which ought to be familiar to every one who ventures to treat of the antiquities of our law; here it is beyond meaſure irkſome, becauſe an error of a line may require a refutation of a page.

From what has been obſerved, it is obvious, that the *firſt* inference drawn by Sir Robert Gordon from the words of Sir James Dalrymple, is utterly erroneous. To ſay, that " after the huſband got the earldom, he was called only *cu-* " *ſtos comitatûs*," is a contradiction in terms; and indeed it is what neither Sir James Dalrymple, nor any one converſant in antiquity, either ſaid, or could have ſaid.

The fact appears to have been, that Robert II. appointed his ſon *cuſtos comitatûs* during the nonage of Counteſs Margaret; and whenever ſhe became marriageable, appointed him her huſband.

The *ſecond* inference, " That Robert Stewart was not till *afterwards* deſign- " ed *Comes de Menteth*, *which muſt have been from creation*," is but a corollary to the former. If *afterwards* means, " after he was called *cuſtos comi-* " *tatûs*," it has been ſhewn, that this *muſt* have been the caſe; for that he could not at once be *cuſtos comitatûs* and *Comes*. If *afterwards* means, " after " his marriage with the Counteſs," it is juſt what the claimant meant to ſhew from the authority of Sir James Dalrymple.

Roſs. Circ. 1375. Sir Walter Leſley, the huſband of Euphame Counteſs of Roſs. *Rymer*, t. 7. p. 215.

OBJECTION.

p. 32. 35. " Sir Walter Leſley is ſtyled, in 1375, *Dominus de Roſs*, i.e. *laird* or " proprietor of the eſtate of Roſs; but, in 1379, he is ſtyled *Comes* de " Roſs, having been created Earl of Roſs."

ANSWER.

It is not certain that Euphame's father was dead in 1375; ſo Walter Leſley may have been ſtyled *Dominus de* Roſs, by reaſon of the right of expectancy which was in him by a charter in 1370. But further, it has been ſhewn by various examples, that the ſame perſon was called *Comes* at one period, and *Dominus* at a ſubſequent period. It has been alſo ſhewn, that he could not have been created Earl of Roſs; for that, if the title of honour was not in his wife, the *heir-general* of the laſt Earl of Roſs, it was certainly in the *heir-male*, then exiſting.

William

William Earl of Douglas, the husband of Margaret Countess of Marr. *Record* charters, Roll 5. N° 91. &c. Marr. 1379.

OBJECTION.

p. 35. "It is said, that William Earl of Douglas was the peer, not his wife."

ANSWER.

This is most improbable, as has been shewn elsewhere. Had he been the peer, Archibald Earl of Douglas, his successor, after the death of Earl James in 1388, would also have been Earl of Marr; whereas the contrary is certain, and acknowledged.

Allan, son of Walter de Faslane, married Margaret Countess of Lennox. *Chartulary of Lennox*, N° 13. * Lennox. Ante 1384.

Alexander Stewart, the husband of Isabel Countess of Marr and Garrioch. *Rymer*, t. 8. p. 460. 461. 500. &c. *Winton. Chronicle passim.* *Original* charter, 20th April 1406, by "Alexander Comes "de Marr." Marr. 1388.

OBJECTION.

p. 35. The objection to this example seems to be, "That Isabel Countess of "Marr conveyed the *comitatus* to Alexander; and therefore, according "to the claimant's principles, Alexander was *Comes* by deed, not by "courtesy."

ANSWER.

If this is the sense of the objection, Sir Robert Gordon must admit, that Alexander Stewart was Earl of Marr, either by the *deed* of Isabel, or by *courtesy*. Both suppositions are equally destructive of his hypothesis.

Sir Patrick Graham, the husband of Euphame Countess of Strathern. *Charters*, 28th March 1414, 8th October 1414. *Sir James Dalrymple*, p. 377. *Rymer*, t. 8. p. 544. and 735. *Fordun*, l. 15. c. 23. Strathern. Ante 1414.

OB-

OBJECTION.

p. 35. This example is ſo appoſite, that Sir Robert Gordon cannot elude it in any other way than by ſuppoſing, "That Sir Patrick Graham was "created Earl of Strathern," while at the ſame time he holds, "that "Euphame, the wife of Sir Patrick, had not even a right to the eſtate "of Strathern."

ANSWER.

There is an obvious contradiction here. The caſe of Strathern has been fully explained in chap. 5.

Buchan. Ante 1574. Robert Douglas, the huſband of Chriſtian Counteſs of Buchan. *Anderſon*, Hiſtorical *Collections*, vol. 2. p. 228.

OBJECTION.

p. 32. 36. "Robert Douglas was created Earl of Buchan by his brother-uterine, "Regent Moray."

ANSWER.

This has been proved an impoſſibility; for that Robert Douglas ſat as Earl of Buchan in that parliament which ratified Moray's title to the regency.

Buchan. 1617. James Ereſkine, the huſband of Mary Counteſs of Buchan. *Royal charter*, 23d March 1617.

OBJECTION.

p. 36. "James Ereſkine was created Earl of Buchan, by patent."

ANSWER.

He bore that title before he got what Sir Robert conſiders as a new patent. It is a limitation of the ſucceſſion, with the old precedency.

In

In the courſe of the argument, more examples of the ſame nature have been produced; and indeed the memory of this cuſtom was not obliterated even at the reſtoration. This will appear from a remarkable paſſage in the *Memoirs of the Earl of Clarendon*, vol. 2. p. 25. octavo edition.

That Noble Author thus ſpeaks of the marriage-contract of the Counteſs of Buccleugh. " Till this time this whole matter was " treated in ſecret among the Scots, but now the King thought fit " to conſult it with others; and telling the Chancellor of all that " had paſſed, ſhewed him the draught prepared by the Scots Advo- " cate, and aſked him, what he thought of it; and likewiſe im- " plied, that he thought fit to give him ſome title of honour. Af- " ter he had read it over, he told his Majeſty, *That he need not give* " *him any other title of honour than he would enjoy by his marriage, by* " *which he would, by the law of Scotland, be called* Earl of Buc- " cleugh."

The guardians of the Lady Eliſabeth have now finiſhed their examination of the *Supplemental Caſe*. Whether that Caſe be as *accurate* as might have been expected from its title, or as *learned* as the profuſion of quotations from hiſtory, treatiſes of law, and records, ſeemed to promiſe, or *altogether as candid* as became the dignity of the judicature to which it was addreſſed, is left with the impartial and intelligent reader to determine.

New matter of evidence may yet be diſcovered; unknown and unanſwerable arguments may perhaps be produced, in ſupport of the pretenſions of the other claimants.

Meanwhile the Guardians will be bold to affirm, That if their ward is not found intitled to the honours of Sutherland, the judgement muſt proceed upon other evidence, and other arguments, than what are urged in *the Original* or *Supplemental Caſe of Sir Robert Gordon.*

Upon the whole, it is humbly hoped, that the foreſaid dignity will be declared, of right, to belong to the claimant, and her heirs.

AL. WEDDERBURN.
AD. FERGUSSON.

Die Jovis 20° Martij 1771

Upon Report from the Lords Committees for privileges to whom it was referred to consider of the petition of Sir Robert Gordon Baronett Claiming the Titles ~~and~~ honours and Dignities of Earl of Sutherland and Lord Strathnaver, and also of the petition of Elizabeth / Claiming the Dignity of Countess of Sutherland and her guardians, and also of the petition of George Sutherland of Forse Claiming the Titles honours and Dignities of Earl of Sutherland and Lord Strathnaver with His Majestys reference thereof to this House, and also of the petition of James Wemyss of Wemyss Esquire for himself and on behalf of Lady Elizabeth his wife Sister of William late Earl of Sutherland and of their infant Children —

Resolved & adjudged by the Lords Spiritual and Temporal in parliament assembled that the Title honour and Dignity of the Earldom of Sutherland descended to Elizabeth the Wife of Adam Gordon upon the death of her Brother John Earl of Sutherland without issue in 1514 as heir of the body of William who was Earl of Sutherland in 1275. was assumed by her husband in her right, and from her have descended to the Heirs male who were also Heirs of her body down to the death of the last Earl of Sutherland in 1766 without any Objection on the part of the Male Line of the said William

Resolved and adjudged by the Lords Spiritual & temporal in parliament assembled that none of the Charters produced affect the Title Honour and Dignity of Earl of Sutherland, but Operate as Conveyances of the Estate only

Resolved and adjudged by the Lords Spiritual & temporal in parliam.t assembled That the Claimant Elizabeth Sutherland has a right to the title honour and Dignity of the Earldom of Sutherland as Heir of the Body of William who was Earl of Sutherland in 1275.

Ordered that this Judgement be laid before His Majesty by the Lords with white Staves — Signed) Ashley Cowper

Clerk Parliamentor

PEDIGREE of ELISABETH (claiming the Title and Dignity of) Counteſs of Sutherland.

HUGO FRESKYN.— Proved by original grant by him to Gilbert Archdean of Moray, of his lands of Scelbol in Sutherland, between 1186 and 1214.—Original confirmations thereof, by "Willelmus Dominus de Sutherlandia, filius et hæres quond. "Hugonis Freſkyn;" and by William and Alexander, Kings of Scotland.—Was ſucceeded by his ſon,

WILLIAM, "Dominus *de Sutherlandia*," 1ſt Earl of Sutherland.— Proved by ſaid original confirmation by him, of his father's grant to Archdean Gilbert prior to 1214,—and original confirmations by William and Alexander, Kings of Scotland.— Indenture between Archibald Biſhop of Caithneſs, and William Earl of Sutherland, 10. calend. Octob. 1275, mentioning "*Willielmum claræ memoriæ, et Willielmum ejus filium, Comites Sutherlandiæ.*"—Was ſucceeded by his ſon,

WILLIAM, 2d Earl of Sutherland.— Proved by ſaid indenture, 10 calend. Octob. 1275.—Rymer, t. 2. p. 266.—Fordun, vol. 2. p. 275.—Renunciation by Kenneth Earl of Sutherland, ſon of the deceaſed William Earl of Sutherland, in favour of Reginald de Moravia in 1330.—Was ſucceeded by his ſon,

KENNETH, 3d Earl of Sutherland.—Proved by ſaid renunciation, granted by him in 1330.—Killed at Hallidon-hill in 1333.—Was ſucceeded by his ſon,

WILLIAM, 4th Earl, who married Margaret, daughter of King Robert I.— Proved by charter, 10th October 1347, by King David II. erecting the earldom of Sutherland into a regality, to the Earl and his wife, *the King's ſiſter*, and to the heirs to be procreate between them;—and many other royal charters in the 17th, 34th, 35th, and 37th years of King David II.—He had two ſons, John and William.—"Johannes filius et hæres Willielmi Comitis Sutherlandiæ" was an hoſtage in England for the ranſom of David II. Rymer, t. 5. p. 724.—He died there in 1361. Fordun, vol. 2. p. 366.—"*Willielmus* "de Murref, *filius Willielmi Comitis Sutherlandiæ*," obtained a protection from Edward King of England, 28th January 1367.—Earl William died in 1370.—Was ſucceeded by his ſon,

WILLIAM, 5th Earl.— Proved by ſaid protection in 1367, Froiſſart, vol. 2. c. 7. p. 12. &c.—Two charters, 16th June 1408, and 8th Auguſt 1418, to Kenneth Sutherland, ſon of the deceaſed William Earl of Sutherland.—He had two ſons, Robert and Kenneth.—Was ſucceeded by his eldeſt ſon,

ROBERT, 6th Earl.—Proved by charter granted by him, in 1400, to his brother Kenneth.—Confirmation thereof by the Duke of Albany in 1408.—Was ſucceeded by his ſon,

JOHN, 7th Earl.— Proved by charter granted by him to Alexander Sutherland, 12th July 1444.—Inſtrument of reſignation, Royal charter, and Royal precepts, 22d, 23d, 24th, and 25th, February 1455.—Was ſucceeded by his ſon,

JOHN, 8th Earl.—Proved by ſaid inſtrument of reſignation, Royal Charter, and Precepts thereupon, in 1455.—He died in 1508.—Had iſſue a ſon John, and a daughter Eliſabeth.—Was ſucceeded by his ſon,

JOHN, 9th Earl.— Proved by inſtrument of ſeiſin in the earldom, as heir ſerved to his father, 14th December 1512.—He died in in 1514.—Was ſucceeded by his ſiſter,

ELISABETH, Counteſs of Sutherland.—She married Adam Gordon, ſon of George Earl of Huntly; who took *by courteſy* the title of Earl of Sutherland.— Proved by her ſpecial ſervice and infeoffment as heir to her brother, 3d October 1514, and 30th June 1515.—Reſignation by Eliſabeth Counteſs, with conſent of her huſband, in favour of her ſon Alexander, 10th November 1527. Royal Charter, and infeoffment thereupon, 1ſt and 20th December 1527.—Her ſon Alexander having predeceaſed her, ſhe was ſucceeded by her grandſon,

KENNETH, ſon of Earl William.—Proved by charter granted to him by Robert Earl of Sutherland, his brother, 22d January 1400.—Confirmation thereof by the Duke of Albany, 10th Auguſt 1408.—Two Charters to him by Mariot Cheyne and Andrew Keith, in 1408 and 1418.—Was ſucceeded by

JOHN SUTHERLAND.—Proved by bond of annuity, payable out of the rents of the town of Drummoy, by Richard Sutherland, ſon and heir to John Sutherland of Forſe, 24th October 1451.—Was ſucceeded by his ſon, the ſaid

RICHARD SUTHERLAND.—Proved by the ſpecial ſervice of John Sutherland, dated 28th May 1471, as heir of this Richard, his father, in the lands contained in the original charter in 1400.—Was ſucceeded by his ſon,

JOHN SUTHERLAND.—Proved by his ſpecial ſervice in 1471, as heir of Richard, his father.—He was living in 1514, and was the undoubted *heir male* of William, the 5th Earl, when Eliſabeth Counteſs of Sutherland ſucceeded to her brother Earl John.—To him ſucceeded his grandſon,

RICHARD SUTHERLAND.—Proved by a precept of *Clare conſtat*, by John, 10th Earl, dated 10th December 1546, to Richard, as heir of John, his grandfather.

George Sutherland of Forſe is ſaid to be lineally deſcended of this Richard, and claims the dignity, as heir-male of the ancient Earls of Sutherland.

and 30th June 1515. — Reſignation by Eliſabeth Counteſs, with conſent of her huſband, in favour of her ſon Alexander, 10th November 1527. Royal Charter, and infeoffment thereupon, 1ſt and 20th December 1527. — Her ſon Alexander having predeceaſed her, ſhe was ſucceeded by her grandſon,

RICHARD SUTHERLAND. — Proved by a precept of *Clare conſtat*, by John, 10th Earl, dated 10th December 1546, to Richard, as heir of John, his grandfather.

George Sutherland of Forſe is ſaid to be lineally deſcended of this Richard, and claims the dignity, as heir-male of the ancient Earls of Sutherland.

JOHN, 10th Earl. — Proved by ſpecial ſervice, 4th May 1546, as heir of Alexander Maſter of Sutherland, his father, and retour, 23d June 1567, as heir to his grandmother Counteſs Eliſabeth. — Was ſucceeded by his ſon,

ALEXANDER, 11th Earl. — Retour, 8th July 1573, as heir to his father, and retour, 12th January 1590, as heir to his great-grandmother Eliſabeth Counteſs of Sutherland. — He died in 1594. — Had iſſue three ſons, John, Robert, and Alexander. — Was ſucceeded by his ſon,

JOHN, 12th Earl. — Proved by Royal Charter, 23d March 1580, (upon his father's reſignation), to him, *and his heirs and aſſignees whatſoever*. — He died 13th September 1615. — Was ſucceeded by his ſon,

ROBERT, ſecond ſon of Alexander, 11th Earl of Sutherland, anceſtor of Sir Robert Gordon, Baronet, claiming as heir-male of Adam Gordon, huſband of Eliſabeth Counteſs of Sutherland.

JOHN, 13th Earl. — Retour, 4th June 1616, as heir to his father. — He died in 1663. — Was ſucceeded by his ſon,

GEORGE, 14th Earl. — Royal Charter, upon his father's reſignation, dated 21ſt February 1662, in favour of him, and his heirs therein named. — Was ſucceeded by his ſon,

JOHN, 15th Earl. — Royal Charter, 24th June 1681, in favour of John Lord Strathnaver, only ſon of George Earl of Sutherland. — Had one ſon, William; — who having predeceaſed his father, he was ſucceeded by his grandſon,

WILLIAM, 16th Earl. — Retour as heir of William Lord Strathnaver his father, 7th January 1723. — He died in 1750. — Was ſucceeded by his ſon,

WILLIAM, 17th Earl of Sutherland: — who died in 1766, leaving iſſue a daughter and only child,

ELISABETH *(Claiming the Title and Dignity of)* Counteſs of Sutherland.